No. 90-6704-CSY
Status: GRANTED
CAPITAL CASE

Title: David Dawson, Petitioner
v.
Delaware

Docketed:
January 2, 1991

Court: Supreme Court of Delaware

Counsel for petitioner: O'Donnell,Bernard

Counsel for respondent: Wharton,Ferris, Myers,Gary A., Fairbanks,Richard E.

Entry	Date	Note	Proceedings and Orders
1	Jan 2 1991	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Jan 28 1991		Order extending time to file response to petition until March 6, 1991.
5	Mar 6 1991		Brief of respondent Delaware in opposition filed.
6	Mar 14 1991		DISTRIBUTED. March 29, 1991
7	Mar 28 1991	X	Reply brief of petitioner David Dawson filed.
9	Apr 1 1991		Petition GRANTED.
			**********
11	Apr 30 1991		Order extending time to file brief of petitioner on the merits until May 31, 1991.
12	Apr 30 1991		Joint appendix filed.
13	May 31 1991		Brief amici curiae of ACLU, et al. filed.
14	Jun 3 1991		Brief of petitioner David Dawson filed.
16	Jun 21 1991		Order extending time to file brief of respondent on the merits until July 26, 1991.
17	Jul 25 1991		Brief amicus curiae of United States filed.
18	Jul 26 1991		Brief of respondent Delaware filed.
19	Aug 21 1991		CIRCULATED.
20	Aug 26 1991		Record filed.
		*	Supreme Court of DE-6 vol.
21	Aug 28 1991	X	Reply brief of petitioner David Dawson filed.
23	Aug 28 1991	X	Reply brief of petitioner David Dawson filed.
22	Sep 5 1991		SET FOR ARGUMENT TUESDAY, NOVEMBER 12, 1991. (3RD CASE)
24	Nov 12 1991		ARGUED.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DAVID F. DAWSON,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF DELAWARE

BERNARD J. O'DONNELL, ESQUIRE
Counsel of Record

BRIAN J. BARTLEY, ESQUIRE
Office of the Public Defender
Carvel State Building
820 N. French Street
Wilmington, Delaware 19801
Tel.: (302) 577-3230

Attorneys for Petitioner

QUESTION PRESENTED

May the State of Delaware use the petitioner's constitutionally protected, however unpopular, racist association or belief as an aggravating circumstance in a capital sentencing hearing in order to support a sentence of death for murder when there is no evidence that the murder was motivated by this association or belief?

LIST OF ALL PARTIES

The names of all of the parties to the proceeding in the court whose judgment is sought to be reviewed by means of this petition appear in the caption of this case and include only DAVID F. DAWSON and the STATE OF DELAWARE.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF ALL PARTIES	ii
TABLE OF AUTHORITIES	iv
PETITION	1
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	14
CONCLUSION	23

INDEX TO APPENDIX

A. Slip Opinion of the Supreme Court of Delaware dated October 4, 1990.

B. Excerpts from appellate transcript used in state court.

C. Stipulation executed at trial.

D. Pertinent Statutory text

TABLE OF AUTHORITIES

CASES

Aptheker v. Secretary of State, 378 U.S. 500 (1964) 16

Baldwin v. Alabama, 472 U.S. 372 (1985) 14

Barclay v. Florida, 463 U.S. 939 (1983) 20

Blystone v. Pennsylvania, 108 L.Ed.2d 255 (1990) 17,18

Booth v. Maryland, 482 U.S. 496 (1987) 17

Brandenburg v. Ohio, 395 U.S. 444 (1969) 16

California v. Brown, 479 U.S. 538 (1987) 18

Commonwealth v. Abu-Jamal, 555 A.2d 846 (Pa. Supr. 1989), cert. denied, ___ U.S. ___, 112 L.Ed 2d 175 (1990) . 20, 21

Eddings v. Oklahoma, 455 U.S. 104 (1982) 19

Elfbrandt v. Russell, 384 U.S. 11 (1966) 16

Healy v. James, 408 U.S. 169 (1972) 15

Herndon v. Lowry, 301 U.S. 242 (1937) 14

Lockett v. Ohio, 438 U.S. 586 (1978) 18,19

NAACP v. Clairborne Hardware, 458 U.S. 886 (1982) 15,20

Noto v. United States, 367 U.S. 290 (1961) 15

Penry v. Lynaugh, 492 U.S. (1989) 17,18,19

Scales v. United States, 367 U.S. 203 (1961) 15

Stromberg v. California, 283 U.S. 359 (1931) 14

Terminiello v. Chicago, 337 U.S. 1 (1949) 14

Texas v. Johnson, 105 L.Ed 2d 342 (1989) 16,20

United States v. Abel, 469 U.S. 45 (1984) 20

United States v. Jackson, 390 U.S. 570 (1968) 14

United States v. Lemon, 723 F. 2d 922 (D.C. Cir. 1983) . . . 16

Zant v. Stephens, 462 U.S. 862 (1983) 14,17

UNITED STATES CONSTITUTION

First Amendment . . . . . passim

Sixth Amendment 2

Eight Amendment 2,14,18,19

Fourteenth Amendment 2,14,18,19

STATUTES AND RULES

28 U.S.C. §1257(a) 2

11 Del. C. Ann. §636 3,5

11 Del. C. §4209 3,4,5,13

United States Supreme Court Rule 20 2

Delaware Rule of Evidence 403 5

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DAVID F. DAWSON,
Petitioner,

v.

STATE OF DELAWARE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF DELAWARE

Petitioner, David F. Dawson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Delaware entered on October 4, 1990 affirming the judgment and sentence of death imposed by the Superior Court of Kent County, Delaware after his conviction for the murder in the first degree.

OPINIONS BELOW

The opinion of the Delaware Supreme Court at issue was filed on October 4, 1990, and is cited in the advance sheets as David F. Dawson v. State of Delaware, 581 A.2d 1078 (Del. Supr. 1990). The slip opinion appears in the Appendix.

JURISDICTION

The petition for certiorari is for review of the judgement and opinion of the Delaware Supreme Court filed on October 4, 1990, which is the direct appeal of a criminal conviction for murder in the first degree and for which a sentence of death has been imposed on the petitioner.

This Court's jurisdiction to review this matter is predicated upon 28 U.S.C. §1257(a) and Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

The Sixth Amendment to the United States Constitution provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ....."

The Eighth Amendment to the United States Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "...nor shall any state deprive any person of life, liberty, or property without due process of law."

The pertinent text from the applicable state statutes, 11 Del. C. Ann. §636, **"Murder in the first degree; class A felony,"** and 11 Del. C. Ann. §4209, **"Punishment, procedure for determining punishment, review of punishment and method of punishment for first-degree murder** is contained in the Appendix at pages 100 through 102.

STATEMENT OF THE CASE

On the afternoon of December 1, 1986, Madeline Kisner was found dead in her home in Clayton, Delaware, murdered during a burglary. (Op-7).[1] Earlier that morning the petitioner, David Dawson, and three other prisoners had escaped from the state correctional facility several miles distant. (Op-4). The petitioner, David Dawson, was later arrested and charged with Robbery, Burglary, Murder and weapons offenses as a result of the Kisner murder.[2] Following a jury trial, Dawson was convicted on all counts related to the burglary and murder. (Op-2).

Following the findings of guilt, a penalty hearing was conducted in order to determine the penalty for Murder in the first degree pursuant to 11 Del. C. §4209. (Op-2). Three statutory aggravating circumstances, having already been supported by proof at the guilt phase of trial, were relied upon by the State and found by the same jury at the penalty hearing to have been established: 1) The murder was committed by an escapee from a place of confinement; 2) The murder was committed during the commission of a burglary or robbery; and, 3) the murder was committed for pecuniary gain.[3] (Op-53).

The State also relied, however, upon the petitioner's beliefs and membership in a white supremacist prison organization known as the Aryan Brotherhood and his alleged satanistic beliefs as non-statutory aggravating circumstances to persuade the sentencing jury to impose a sentence of death on the petitioner.[4] (Op-47,48,49).

Prior to trial the defense had objected to the introduction of any evidence concerning the defendant's alleged membership in the Aryan Brotherhood during the trial or penalty phase on the ground that Dawson's First Amendment rights of freedom of belief, freedom of association, freedom of religion, and due process rights would be violated if the State were allowed to introduce such evidence. (Op-47,48; A-72,73,74,75,76)

The trial court rejected petitioner's contention that the First Amendment precluded the admission of such evidence at his penalty hearing and ruled that the admissibility of such evidence would be determined during the penalty hearing at the time of its proffer by "judg[ing] its probative value and any defense balancing as necessary under Rule 403 in the context of what proceedings are

---

[1] References to the Appendix will be designated "A-" except that the citation "Op-" will refer to the slip opinion which is found in the appendix at the corresponding pages. (eg. Page 8 of the slip opinion will be found at A-8 of the Appendix).

[2] No other direct or circumstantial evidence, other than a later statement from the petitioner, implicated the three other prisoners in the homicide.

[3] One statutory aggravating circumstance must necessarily have been established as a condition precedent to a jury's recommendation of death. 11 Del. C. Ann. Sec. 4209 (e) (1). In addition, each of three counts of murder of which the petitioner had been convicted, 11 Del. C. Ann. Sec. 636 (a), (2), (6), (7), also constituted a statutory aggravating circumstance as a matter of law although each of these counts and the enumerated statutory aggravating circumstances essentially overlapped . 11 Del. C. Ann. Sec. 4209 (e) (2).

[4] The State also offered evidence concerning the defendant's prior criminal history as a non-statutory aggravating circumstance.

at the time in which the evidence is offered." (Op-14,15; A-77). Again, before the commencement of the penalty hearing the defense renewed its objection that such evidence should be excluded during the penalty hearing because it would violate the petitioner's First Amendment rights of freedom of association and freedom of religion and due process and also because it was inflammatory and irrelevant. (Op-47,48).

At that time, the State represented that it intended to introduce: 1) expert testimony concerning the origin and nature of the Aryan Brotherhood, 2) photographs of the petitioner's body depicting various tatoos, including one associated with membership in the Aryan Brotherhood and one which depicted the word "Abbaddon", 3) testimony that the petitioner referred to himself as "Abbaddon" and that the name meant "one of Satan's disciples" or "angel of the bottomless pit", and 4) a picture of a swastika painted on the wall of the petitioner's prison cell. (Op-47).

The trial court directed the prosecution to provide a proffer of the evidence it wished to introduce concerning the Aryan Brotherhood and the petitioner's membership therein. (A-78,79). In response, the State indicated that it intended to call an expert employed by the Federal Bureau of Prisons whose particular area of expertise was "disruptive groups" who would testify that the original Aryan Brotherhood began in California and that separate groups calling themselves the Aryan Brotherhood thereafter sprang up in various other penal institutions across the country. (A-80). The prosecution conceded that it had no idea of "what specific

attributes might be applicable to a Delaware inmate who is a member of an Aryan Brotherhood." (A-82,90). According to the prosecution, there was no one with any expertise on the Delaware branch of the Aryan Brotherhood and, although its expert was

> "not familiar with the Delaware off-shoot of the Aryan Brotherhood, [he could] help the jury in the sense that he can tell us something about Aryan Brotherhoodism. He can tell us what that is."

(A-81). The State conceded that its expert would testify that there are various state adaptations of the Aryan Brotherhood from prison to prison without a national cohesiveness:

> "he will tell us that Texas Aryan Brothers do not recognize Arizona Aryan Brothers and vice versa and members of the Aryan Brotherhood in the State system don't necessarily recognize Aryan Brothers within the federal system."

(A-80,81).

The State also conceded petitioner was not a full-fledged member of the Aryan Brotherhood: "[there] are those such as Mr. Dawson who merely ascribe to that set of values.... [and] are not identified as full-fledged members" (A-86). When asked by the trial Court how the Aryan Brotherhood could be tied into the petitioner, the prosecution responded in part:

> "Well, Your Honor, as I said, it wouldn't be tied in a specific sense. The State can't produce an expert who can tell us that David Dawson holds this particular belief or David Dawson acts upon this particular belief. What we seek to introduce is some understanding of what David Dawson ascribes to himself, the label Aryan Brotherhood."

(A-82). The prosecution later expanded on this point:

> "In other words, we are looking at the character of the man, David Dawson, and not only things that he does.....What is important for the jury to understand is

what he is into. This is his character. His character is he thinks the Aryan Brotherhood is a really neat organization and he believes in the things that they believe in. He wears their tattoo. He wears their belt. He carries their literature, he paints his wall and so forth."

(A-85,86). According to the prosecutors, some literature seized from the petitioner's prison cell "deal[t] with kinds of white supremacy as religion." (A-84).

At the conclusion of the foregoing proffer by the prosecution, the trial court asked defense counsel: "Doesn't the joining of the Aryan Brotherhood provide at least some clue as to the character of the individual who would do that?" to which defense counsel responded:

> Yes. It provides some clue as to his character, but our position is that when it shows his character by indicating what his beliefs are, he should not be punished for his beliefs. If the jury is to impose a death penalty, they should base it on the crimes for which he has been convicted today, his crimes in the past, actions that he has done or failed to do. But he shouldn't be punished for some abstract thought of what he believes in that he has not acted upon. The fact that he may not like any of the people in this room is not really relevant if he has taken no action against anyone. <u>What one individual thinks in his or her mind should not be a ground used to find a fact to give to condemn that person to death</u>.

(A-87,88). (emphasis added). The trial court then asked that prosecution:

> ...Doesn't evidence about the Aryan Brotherhood, as it exists or may exist elsewhere, present the potential for diverting the jury's attention away from Dawson's background and record and the circumstances of the crime?

(A-88), to which the State responded in part:

> It does to the extent that we get bogged down in the minutia of the various state adaptations. I would agree with the Court. The State did not envision spending a

morning with this expert, as I say, but we do think that the defendant's character is relevant and the fact that he would ascribe to a set of beliefs that are known to be held by the Aryan Brothers. In other words, if the defendant thought himself a Swedenborgin, that is a Christian religion. I don't know too much about it, but I don't know if the FBI here does, but it is a Christian religion and it is a good religion. I know some people who are in it and they are good people. If that man was on trial for his life, it might make sense in litigation for that defendant to be permitted to have someone testify as to what Swedenborgins are and what beliefs they hold, why someone would want to be a Swedenborgin and why and what tells you about the man who is on trial. Likewise, Amish people or any other group. I mean, I merely flip it over so analytically we don't get bogged down with the fact that the defendant's particular beliefs manifest themselves through his membership in an organization that is committed to something other than laudable goals. The fact that the group happens to be the Aryan Brotherhood shouldn't change the interest whether it's relevant and admissible and so forth, or whether it's unnecessary and unfairly diverts the jury's attention. The State's position is that the jury should be permitted to focus on the Aryan Brotherhood as an organization, as a recognized organization.

(A-88,89).

The prosecution told the trial court that there was no indication that petitioner did anything unlawful in conjunction with his membership in the Aryan Brotherhood and that the petitioner's ideology alone without any associated illegal conduct was itself material to the issue of whether the petitioner should be put to death:

> THE COURT: Other than perhaps painting his wall, has Mr. Dawson, in conjunction with his Aryan Brotherhood membership as it is purported to be, done anything unlawful while in prison?
>
> PROSECUTOR: Well, he may have, Your Honor. Nothing that we have caught him at.
>
> THE COURT: Anything that the State could offer?
>
> PROSECUTOR: No, Your Honor.....We don't think it is

> important that whether he acted or not acted on his membership in this group--what he thinks is important is that is the kind of thing he ascribes to. That is his character. He thinks that the Aryan Brotherhood is an organization that he wishes to align himself with.

(A-92). The defense took express exception to the State's assertion that ideology not accompanied by anti-social conduct is material to the issue of whether a person should be put to death:

> Your Honor, our position on that is if I may give Your Honor two examples. Let's assume for the sake of argument that the State would prove by some means that my client likes Adolph Hitler. Let's also assume that the State could prove by some means that my client likes the Pope. If he takes no action based on his like for Adolph Hitler or like for the Pope or dislike for the Pope, so what. If it is a feeling he has, if it is a belief he has, it is totally irrelevant. If the State can tie it in, that because of his belief, he has acted in some improper way, then it becomes relevant. But if it is a belief, something that he has in his mind, it is totally irrelevant. The jury should not be permitted to consider that.

(A-92,93) The defense reiterated similar reasoning in opposition to the State's intention to introduce evidence of the petitioner's alleged belief in Nazism:

> "Once again, Your Honor, our position is that if the State can only show a belief, that is not sufficient; whether it is Nazism or Aryan Brotherhoodism or whatever. If they can tie that into an act because of my client's alleged Nazi beliefs that he specifically--and let's say, for instance, incited a prison riot or whatever they want to, if they can tie it into an act, they should be entitled to introduce that. If it is something that this man has in his head and merely paints it on his wall, he shouldn't be put to death for that.

(A-94).

The State took the position that because the defendant was entitled to offer "character" evidence in mitigation, it was entitled to introduce "character" evidence not merely in rebuttal of character evidence offered in mitigation but affirmatively in

support of imposition of the death penalty:

> Your Honor, I think that is fine. I mean if the defense is not inconsistent in their logic. If they want to introduce or if they think that things he has done--excuse me organizations he has joined, beliefs he may hold that are admissible to show his character and propensities in a penalty hearing, then the same thing applies for beliefs and organizations he has joined which are bad. You can't have it both ways. They are either all in or all out.

(A-94).

The trial court ruled that evidence of Dawson's membership in the Aryan Brotherhood as well as the nature and origin of that group was probative as the issue of character and whether or not the jury should impose a sentence of death:

> membership or the act of joining an organization of any particular kind, whether it be the Aryan Brotherhood or the Boy Scouts of America can be probative of character, at least to some extent. The real issue before the Court is whether the probative value is outweighed by the danger of unfair prejudice.

(Op-48, A-95).

Prior to the commencement of the penalty hearing, the parties stipulated that:

> The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware."

(A-99). In exchange, the State agreed not to call an expert witness to explain the nature and origin of the organization. (Op-48). Besides this stipulation, the State presented evidence at the penalty hearing before the jury that the defendant's hand bore a tattoo with the name Aryan Brotherhood and a symbol contained in it. (Op-48). In addition, over the defendant's objection, the

State was also permitted to offer evidence that a tattoo containing the term "Abbaddon" was located across petitioner's stomach area and that Webster's dictionary defines "Abbaddon" as "angel of the bottomless pit." (Op-49). The State also presented testimony that on the same night following the homicide the petitioner introduced himself to someone he had met that night as "Abbaddon" and said that name meant "one of Satan's disciples."[5] (Op-49).

The State presented no other evidence during the penalty hearing concerning the Aryan Brotherhood in addition to the aforementioned stipulation nor did it present evidence of any conduct by petitioner which it ascribed to his membership in the Aryan Brotherhood. Instead, the sole evidence presented to the jury concerning the Aryan Brotherhood was that its ideology was that of white racism. Despite the absence of any evidence of misconduct by Dawson which could be ascribed to his membership in the Aryan Brotherhood or any acts of misconduct by the Aryan Brotherhood in the Delaware Correctional Center [or anywhere else], the State emphasized the petitioner's membership in a white racist gang as an aggravating factor supporting the death penalty in its opening statement to the jury at the penalty hearing:

> ....You will hear evidence that the defendant is a member of the Aryan Brotherhood and the stipulation will include the fact that the Aryan Brotherhood is a racist, a white racist prison gang.....

(A-96), as well as in its closing statement:

---

[5] At the penalty hearing the State did not attempt to introduce any evidence concerning swastikas to which it had earlier alluded.

> ...The character and propensities of the defendant. We introduced evidence to you, ladies and gentlemen, about other things which go directly to his character and propensities. The Aryan Brotherhood is a white racist prison gang. What does that tell you about David Dawson?.....Those are the nonstatutory aggravating circumstances, ladies and gentlemen. Those are other reasons why--those are the character, they reflect the character, the propensities of David Francis Dawson. They tell you what type of person he is. They also call out for the death penalty and what is the response to that?

(A-97,98).

The jury unanimously recommended a sentence of death for the murder convictions. (Op-2). As a mandatory consequence of the jury's recommendation, 11 Del. C. §4209(d), the petitioner was sentenced to death by lethal injection. He received an additional 100 years of incarceration in connection with the other convictions. (Op-2).

REASONS FOR GRANTING THE WRIT

That a State may use constitutionally protected beliefs as an aggravating circumstance against a defendant convicted of murder in order to convince a jury to impose the ultimate punishment of death presents a novel proposition and constitutes a dangerous intrusion to long standing First Amendment precedent as well as to traditional concepts of fairness embodied in the Eighth and Fourteenth Amendments.

This Court is requested to grant certiorari to review whether the State of Delaware may introduce evidence of a defendant's racist beliefs or associations as evidence of character relevant to the individualized determination a jury must make with respect to the appropriateness of the death penalty.

The use of such evidence contravenes the prohibition against the use of constitutionally protected belief in a death penalty hearing as articulated in Zant v. Stephens 462 U.S. 862, 884 (1983). In Zant v. Stephens, the Court wrote:

> Georgia has not, for example, sought to characterize the display of a red flag, cf. Stromberg v. California, 283 U.S. 359 (1931) the expression of unpopular political views, cf. Terminiello v. Chicago, 337 U.S. 1 (1949), or the request for trial by jury, cf. United States v. Jackson, 390 U.S. 570 (1968), as an aggravating circumstance. Nor has Georgia attached the "aggravating" label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example race, religion, or political affiliation of the defendant, cf. Herndon v. Lowry, 301 U.S. 242 (1937)...If the aggravating circumstance at issue in this case had been invalid for reasons such as these, due process of law would require that the jury's decision to impose death be set aside.

Id. at 885. See also Baldwin v. Alabama, 472 U.S. 372, 382 (1985).

The Delaware Supreme Court regarded the petitioner's beliefs and membership in the Aryan Brotherhood to be probative of his "character." Because character is a relevant consideration in a capital sentencing proceeding, the Delaware Supreme Court reasoned that evidence of character must therefore be admissible as an aggravating circumstance by the State in this capital sentencing proceeding regardless of any limitations on admissibility in the context of any other criminal prosecutions.

The First Amendment, however, prohibits the State from punishing an individual solely because of his association with another. NAACP v. Clairborne Hardware, 458 U.S. 886, 918 (1982). In order to punish for what in any other context may also be protected expression, there must exist a specific intent to accomplish the organization's goals by resort to violence. Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 367 U.S. 290 (1961). Guilt by association with a group, however unpopular, is impermissible absent proof of a specific intent to further the violent goals of an organization. Healy v. James, 408 U.S. 169 (1972).

There was not a shred of evidence in the case below that the group with which the petitioner was accused of associating, (the Aryan Brotherhood), advocated illegal goals or that the petitioner specifically intended to accomplish the goals of that organization by resort to violence. As has already been noted, the evidence only indicated that the organization embraced an ideology of white racism and that it was formed in response to other gangs of racial

minorities.[6]

Even in support of a racist ideology, mere advocacy of the use of force or violence does not remove speech from First Amendment protection unless such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such lawless action. Brandenburg v. Ohio, 395 U.S. 444 (1969).

If the government cannot fine the petitioner $50 for disorderly conduct as a result of such belief, or deny him employment or a passport as a result of such belief, then the government cannot seek the petitioner's death as a result of holding such beliefs. Aptheker v. Secretary of State, 378 U.S. 500 (1964); Elfbrandt v. Russell, 384 U.S. 11 (1966).[7]

A sentence based to any degree on beliefs protected by the First Amendment is constitutionally invalid. United States v. Lemon, 723 F.2d 922 (D.C. Cir. 1983) (prisoner defendant a member of the "Black Hebrews").

Neither the State of Delaware expressly argued nor the Court below expressly found that an individual's personal racist beliefs

---

[6] If the State's advocacy of this exception to protected constitutional expression is correct, then nothing would prevent the State from arguing in another context that a member of a racial minority gang must also face that association as an aggravating circumstance in a death penalty proceeding.

[7] If government also could not fine the petitioner $50 for burning an American flag, a question also presented by the case below is whether government could, notwithstanding, use that activity as an aggravating circumstance relevant to character if the flag burner is later convicted of capital murder. See Texas v. Johnson, 491 U.S. ___, 105 L.Ed 2d 342, 109 S.Ct. ___ (1989).

are not to be accorded First Amendment protection. The court below, however, found that evidence concerning the defendant's racist beliefs and membership in the Aryan Brotherhood was admissible as an aggravating circumstance in the capital sentencing proceeding because it focused upon the defendant's character and his view of himself as well as how he wanted to be viewed by others.[8] (Op-55). In rationalizing its result, the court below noted that the petitioner's sentencing jury was required to make an "individualized determination of whether Dawson should be executed or incarcerated for life, based upon Dawson's character, his record and the circumstances of the crime." (Op-53) (citing Booth v. Maryland, 482 U.S. 496 (1987) (emphasis in original); Zant v. Stephens, 462 U.S. 862, 879 (1983); Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083 (1990); Penry v. Lynaugh, 109 S.Ct. 2934 (1989)).

The court below clearly misunderstood the role of character evidence in a capital sentencing proceeding even though a number of prior decisions of this Court have properly defined the role of character evidence. Simply put, general character evidence is to be offered in mitigation not for aggravation of the offense. The court below did not consider that the character of a defendant is a relevant factor which the fact-finder must consider in a capital proceeding when the defendant attempts to offer mitigating evidence

---

[8] It might also be observed, perhaps by some artists or their critics, that self-perception and a desire to have one's self-perceptions shared by others is a hallmark of, if not the driving force behind nearly all expressive activity and speech.

concerning his character. Under the Eight Amendment, the State may not constitutionally preclude such mitigating evidence from the fact finder's consideration. Lockett v. Ohio, 438 U.S. 586 (1978).

Several of the more recent decisions of this Court continue to bear out this principle notwithstanding the misplaced reliance of the court below on some of those authorities. In its most recent term this Court explained:

> The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence. [footnote omitted]. ...the jury was specifically instructed to consider, as mitigating evidence, any "matter concerning the character or record of the defendant, or the circumstances of his offense."

Blystone v. Pennsylvania, 494 U.S. ___, 108 L.Ed 2d 255, 264-265, 110 S.Ct. ___ (1990). In addition, a state cannot, "consistent with the Eight and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigates against imposing the death penalty." Penry v. Lynaugh, 492 U.S. ___, 106 L.Ed 2d 256, 278, 109 S.Ct. ___ (1989). Moreover, "the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). This Court has consistently affirmed the principle that:

> [T]he Eight Amendment mandates an individualized assessment of the appropriateness of the death penalty. ...the Eighth and Fourteenth Amendments require that the sentencer "not be precluded from considering, **as a mitigating factor**, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

Penry v. Lynaugh, 492 U.S. at ___, 106 L.Ed 2d at 277 ((citing Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in original)). Accord, Eddings v. Oklahoma, 455 U.S. 104 (1982).

Thus, contrary to the State of Delaware's belief otherwise, simply because a defendant may not constitutionally be precluded from putting his character in issue, does not mean that the State may affirmatively put a defendant's character in issue when that character is manifested only in beliefs entitled to protection under the First and Fourteenth Amendments.

The Delaware Supreme Court approved the State's affirmative use of evidence of the petitioner's beliefs in or affiliation with a white racist group as an aggravating circumstance although:

1) there was no arguable racial motive behind the murder or evidence that the murder was in any respect motivated by such beliefs;

2) the sole evidence presented to the jury concerning the group was that its ideology embraces white racism;

3) no anti-social or unlawful conduct was ascribed to the group or to the defendant by virtue of his membership;

4) the defendant's affiliation was not relevant to any issue of credibility; and

5) the defendant's membership was not offered to rebut any

evidence offered on the issue of mitigation of penalty.

This Court has recently said that:

> If there is a bedrock principle underlying the First Amendment it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

Texas v. Johnson, 491 U.S. ___, 105 L.Ed 2d 342, 109 S.Ct. ___ (1989).

The uses to which evidence concerning a defendant's constitutionally protected activities may be permissibly employed in a death penalty proceeding are certainly limited and clearly circumscribed.

Such evidence is permissible to demonstrate a racial motive behind the murder. Barclay v. Florida, 463 U.S. 939 (1983). The State did not contend in the case below that the petitioner's affiliation with the Aryan Brotherhood provided a racial motive or purpose for the murder. (Op-55).

No anti-social conduct or unlawful conduct could be ascribed to the petitioner by virtue of his association with the Aryan Brotherhood. NAACP v. Clairborne Hardware, 458 U.S. at 920.

Under the facts of the case below the petitioner's affiliation with the Aryan Brotherhood was not relevant for any limited purpose on the issue of credibility. No witness was sought to be discredited as a result of bias because of a mutual belief in or association with the Aryan Brotherhood. Cf. United States v. Abel, 469 U.S. 45 (1984).

The State did not offer the prohibited "character" evidence to rebut any character evidence offered by the defendant. If the

defendant had offered "character" evidence to the effect that he was a life-long member of the NAACP or the National Conference of Christians and Jews and believed in their goals, evidence of an actual association with an organization with established antithetical goals, conceivably may have been proper rebuttal. This principle was clearly evident in the Pennsylvania Supreme Court's decision in Commonwealth v. Abu-Jamal, 555 A.2d 846 (Pa. Supr., 1989), cert.denied, ___U.S. ___, 112 L.Ed 2d 175, ___ S.Ct. ___, upon which the Delaware Supreme Court mistakenly relied. The court in Abu-Jamal stated:

> Punishing a person for expressing his views or associating with certain people is substantially different from allowing his statements to be used for impeachment or to be considered as evidence of his character where that character is a relevant inquiry.

Id. at 859 (emphasis added). Because the petitioner never placed his ideology in issue as a mitigating circumstance, his white racist beliefs never became a relevant inquiry.

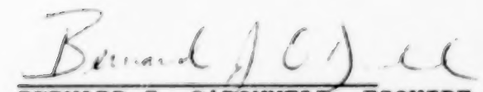
The State's argument, however, that because a defendant is permitted to put his character in issue as a matter of law, such as belonging to the Boy Scouts or the Rotary Club, then the State is also affirmatively permitted to put bad character in issue as evidenced through protected beliefs, thoroughly misunderstands the nature of the protection to be accorded those beliefs. Simply because a defendant might constitutionally be permitted to offer evidence that he is a ordinarily a religious, law abiding man, does not permit the State to offer evidence in the first instance that a defendant facing execution does not attend church.

The Delaware Supreme Court's opinion exhibits a clear confusion of the admissibility of evidence concerning the exercise of constitutionally protected activities for a limited purpose with a general admissibility for the purpose of establishing character warranting the imposition of the death penalty.

CONCLUSION

For all of the foregoing reasons, the petitioner DAVID DAWSON prays that this court grant his petition for a writ of certiorari to review the judgment and opinion below of the Supreme Court of Delaware.

Respectfully submitted,



BERNARD J. O'DONNELL, ESQUIRE

Counsel of Record for
David Dawson, Petitioner

(3) 90-6704

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

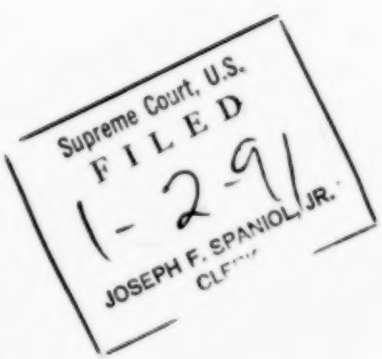
DAVID F. DAWSON,
Petitioner,

V.

STATE OF DELAWARE,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

to the SUPREME COURT of the STATE of DELAWARE



BERNARD J. O'DONNELL, ESQUIRE
Counsel of Record

BRIAN J. BARTLEY, ESQUIRE
Office of the Public Defender
Carvel State Building
820 N. French Street
Wilmington, Delaware 19801
Tel.: (302) 577-3230

Attorneys for Petitioner

103 pp

TABLE OF CONTENTS

Slip opinion in Dawson v. State, 581 A.2d 1078, (Del., October 4, 1990) (en banc) 1

Excerpts of transcript proceedings below 72

Stipulation between counsel that the Aryan Brotherhood refers to a white racist prison gang dated June 27, 1988 . . 99

Applicable statutory provisions 100

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID F. DAWSON,	§	
	§	Nos. 300/336, 1988
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware,
v.	§	in and for Kent County
	§	Cr.A. Nos. IK86-12-0024,
STATE OF DELAWARE,	§	IN87-01-0841, IK87-01-0843,
	§	and IK87-01-0845
Plaintiff Below,	§	
Appellee.	§	

Submitted: March 13, 1990
Decided: October 4, 1990

Before **HORSEY, MOORE, WALSH and HOLLAND**, Justices and **JACOBS**, Vice Chancellor (sitting by designation pursuant to Del. Const. art. IV, § 12) (constituting the Court en banc).

Upon appeal from the Superior Court. **AFFIRMED.**

Paul S. Swierzbinski, Esquire and Bernard J. O'Donnell, Esquire, Assistant Public Defenders, Wilmington, Delaware, on behalf of appellant.

Ferris W. Wharton, Esquire, Deputy Attorney General, Wilmington, Delaware, on behalf of appellee.

HOLLAND, Justice:

Following a jury trial in the Superior Court, in and for Kent County, the defendant-appellant, David F. Dawson ("Dawson"), was convicted of four counts of Murder in the First Degree, six counts of Possession of a Deadly Weapon During the Commission of a Felony, Robbery in the First Degree, Burglary in the Second Degree, and Possession of a Deadly Weapon by a Prohibited Person.[1] On June 28, 1988, after a two-day penalty hearing, the jury unanimously recommended a sentence of death for Dawson on each of the four counts of Murder in the First Degree.

On July 22, 1988, Dawson was sentenced to death by lethal injection, as a result of each of the murder convictions, in accordance with the jury's recommendations. The Superior Court also sentenced Dawson to be incarcerated for a total of 100 years with regard to the other convictions. On July 15, 1988, Dawson filed a motion for a new trial or, in the alternative, for a new penalty hearing. He also filed a motion to delay his sentencing. Both of those motions were denied.

Dawson's counsel filed a timely notice of appeal. An automatic appeal was also docketed. 11 Del. C. § 4209(g). Those appeals have been consolidated. Dawson's execution has been stayed.

In this direct appeal, Dawson argues that his convictions

---

[1]Dawson was indicted by the grand jury of Kent County on January 5, 1987. All fifteen counts of the indictment related to events occurring on December 1, 1986. Two counts of the indictment charged Dawson with Burglary in the First Degree and Misdemeanor Theft at the home of Frank and Dorothy Seeney, in the general vicinity of the murder scene. Dawson entered a guilty plea as to these two counts, but proceeded to trial on the other thirteen counts.

should be reversed because: (1) he was denied a fair trial and penalty hearing, when the Superior Court declined to rule on a motion in limine prior to jury selection; (2) the Superior Court denied his motion for a change of venue, which alleged that there had been prejudicial pretrial publicity or, alternatively, that the increased likelihood a Kent County jury will recommend a death sentence introduces an element of bias and arbitrariness into the penalty determination process; (3) the Superior Court failed to properly excuse several jurors for cause and denied Dawson's motion for additional peremptory challenges; (4) the State presented evidence relating to the theft of two vehicles, when the State did not have clear and convincing evidence to connect Dawson with either of those crimes; and (5) the State presented irrelevant and prejudicial evidence of his commission of a burglary at the residence of Frank and Dorothy Seeney on the morning that the victim, Madeline Kisner, was killed.

Dawson also argues that he is entitled to a new penalty hearing because (1) the State's unbridled discretion in determining which defendants, convicted of Murder in the First Degree, will be subjected to a death penalty hearing is contrary to Delaware law and in violation of the Federal Constitution; (2) the Superior Court erroneously permitted the State to present evidence of his membership in the Aryan Brotherhood during the penalty hearing; (3) the Superior Court erroneously permitted the State to present evidence that his nickname was "Abaddon" along with the definition of that name, during the penalty hearing; and (4) the Superior

Court erroneously instructed the jury, concerning its discretion in recommending the imposition of the death penalty.

We have reviewed each of Dawson's contentions. We find no reversible error. Therefore, the judgments of the Superior Court, which resulted in Dawson's convictions and sentences, including the imposition of the death sentences, are affirmed.

FACTS

On the morning of December 1, 1986, between midnight and 2:30 a.m., Dawson escaped from the Delaware Correctional Center ("DCC") near Smyrna along with three other inmates: Mark McCoy ("McCoy"), Richard Irwin ("Irwin") and Larry Nave ("Nave"). According to the State, McCoy, Irwin and Nave stole one car and proceeded north, while Dawson stole another car and travelled south, where the events for which he was convicted occurred. In support of its theory, the State presented evidence of several car thefts, items obtained from the stolen vehicles, eyewitness testimony, items found in Dawson's possession when he was apprehended, and expert testimony concerning the scientific analysis of certain evidence.

The Northbound Activity

During the early morning hours of December 1, 1986, a 1965 Mustang automobile was stolen from the northern part of the Town of Smyrna. At approximately 6:15 a.m., the police discovered this vehicle parked on the northbound shoulder of Route 13, about one-half mile south of Fieldsboro. Fieldsboro is located approximately eight and one-half miles north of Smyrna. The police recovered a latent fingerprint from the vehicle, which was subsequently

identified as McCoy's, and an address book belonging to Nave.

Wilbert Dill ("Dill") testified that he operated the Fieldsboro Service Station, located at the intersection of Route 13 and Noxontown Road. When Dill arrived for work at approximately 5:45 a.m. on December 1, 1986, he saw three men standing by the station's bathrooms. Dill testified that, from the station's office, he watched the three men attempt to enter vehicles which were parked at the businesses located on the other three corners of the intersection. According to Dill, all three men seemed to be wearing similar blue clothing.

Cathy Spence ("Spence"), Nave's sister, identified the three men seen by Dill as Irwin, McCoy and Nave. Spence testified that her brother had telephoned her during the early morning hours of December 1, 1986. In response to those telephone calls, Spence stated that she went to the Fieldsboro Service Station. There, she provided Irwin, McCoy and Nave with clothing to replace their blue prison uniforms and transported them away. According to Spence, she remained with Nave, Irwin and McCoy until 6:30 or 7:00 p.m. that evening, riding around the back roads of New Castle area. Spence testified that she never saw Dawson that day.

The Southbound Activity

Sometime between 10:00 p.m., November 30, 1986, and 7:15 a.m. on December 1, 1986, a 1979 Oldsmobile Starfire was stolen from a location on the southern side of the Town of Smyrna. That vehicle was recovered by the Delaware State Police on County Route 139 outside of Kenton. Kenton is located southwest of Smyrna. The

vehicle was first observed in this location between 6:00 and 6:30 a.m. on December 1, 1986.

Early that same morning, the home of Frank and Dorothy Seeney (the "Seeneys") was burglarized. The Seeneys' house is located on County Route 168, approximately 2 miles southwest of Kenton, not far from where the 1979 Oldsmobile Starfire car was found. Mr. Seeney testified that on the morning of December 1, 1986, he left home about 5:30 a.m. Mrs. Seeney left their home about 6:30 a.m. Upon returning from work, sometime after 3:30 p.m., Mrs. Seeney discovered the burglary. An inspection of the Seeney's home revealed that a men's size forty-eight motorcycle jacket, several pocket watches, and containers of loose change had been stolen. Prior to trial, Dawson pled guilty to the two counts in the indictment which charged him with the burglary of the Seeneys' home.

The Murder Scene

The residence of Richard and Madeline Kisner is located approximately one-half mile from the Seeneys' home. Richard Kisner testified that on December 1, 1986, he left for work shortly after 7:30 a.m. His son, Brian, who was sixteen at the time, had left for school a few minutes before him. Richard Kisner testified that when he left for work, Mrs. Kisner was still at home. Her car, a 1986 Chrysler LeBaron, and a Ford pickup truck remained in the driveway.

Madeline Kisner, who usually arrived at her job by 8:30 a.m., never reported to work on December 1, 1986. Mrs. Kisner's friend

and co-worker, Alice Holman ("Holman"), testified that she tried unsuccessfully to telephone Mrs. Kisner at home around 8:45 a.m., shortly after 9:00 a.m. and again about 1:15 p.m. When Holman telephoned Kisner's home again at approximately 3:40 p.m., Brian answered. According to Holman, Brian told her that his mother was apparently sleeping and he thought that she must be sick.

Brian testified that, on December 1, 1986, he arrived home from school between 3:30 and 3:40 p.m. and immediately went to his bedroom to change his clothes. Brian testified that, as he walked past his parents' room, he noticed his mother lying on her bed. She was wearing a red house coat, which she usually wore. It appeared to him that she was asleep. Brian said he assumed that his mother was sick and made no attempt to talk to her at that time.

Brian testified that after he received Holman's phone call, he went from the kitchen to the doorway of his parents' room. Brian then called to his mother but received no response. At this point, he noticed blood around his mother's head. Brian testified that he then went to his room, armed himself with a knife and, called the police. Thereafter, Brian went outside, locked himself in the family's Ford pick-up truck, and waited for the police.

When the police arrived, they found Madeline Kisner's body lying on her bed. She was dressed in a red housecoat. A nylon stocking was around her neck. Mrs. Kisner's hands had been bound behind her back with shoe laces. She had been gagged with a sock which had been placed over her mouth and knotted behind her head.

She had lacerations on her forehead and multiple stab wounds to the chest area.[2]

At about 5:30 p.m., when Richard Kisner arrived home, the police were still conducting their investigation. Mr. Kisner testified that he was asked to ascertain what, if anything, had been taken from his house. He determined that the keys to the Chrysler LeBaron were missing and that the car was not in the driveway. He also discovered that some money, which had been on the top of the bedroom chest of drawers, was missing. Mr. Kisner could not remember whether his wife's purse was missing, but he did testify that she always kept several two dollar bills in her wallet.

Dawson's Apprehension

Patty Dennis ("Dennis") testified that she encountered Dawson in the Zoo Bar in Milford, Delaware, on the evening of December 1, 1986. Dennis went to the bar around 6:00 p.m. on that date. Her roommate, Geraldine Ryan ("Ryan"), entered the Zoo Bar at approximately 7:00 p.m., and began talking to a man Dennis did not know. After a period of time, Dennis, Ryan, the man with whom she was speaking and several others went to another bar called the Hide-A-Way. Ryan's companion was wearing a black leather jacket which was

[2]Dr. Judith Tobin of the State Medical Examiner's office performed an autopsy. Dr. Tobin testified that Mrs. Kisner had sustained twelve stab wounds to the chest, a wound to the head and various attempted strangulation wounds to the neck. Dr. Tobin determined that cardiac tamponade (a hemorrhage within the pericardial sac which prevents the heart from pumping blood) resulting from one or more of the stab wounds had caused Mrs. Kisner's death.

too big for him. The group subsequently left the Hide-A-Way and went back to the Zoo Bar. Ryan's companion was asked to leave the Zoo Bar upon his return. Dennis identified Dawson as Ryan's companion.

On December 1, 1986, at approximately 9:25 p.m., Sergeant Keith Hudson ("Sergeant Hudson") of the Milford Police Department noticed a person matching Dawson's description leaving the Zoo Bar. Sergeant Hudson testified that the person he saw was approximately five feet ten inches tall, weighed about one hundred seventy-five pounds, had long hair, a beard, and was wearing a black leather motorcycle type of jacket and hat. Sergeant Hudson testified that the person he observed exiting from the Zoo Bar, turned left at a street corner and disappeared. Sergeant Hudson and another officer pursued this individual, without success.

However, Sergeant Hudson did locate Mrs. Kisner's 1986 Chrysler LeBaron in a parking lot near the Zoo Bar. The police recovered a Herr's corn chip bag and the cellophane wrapper for a cigarette carton from inside the Kisner car. It was subsequently determined that Dawson's fingerprints were on both of these items. A postcard was also found in the Kisner car. It was signed with Dawson's nickname, "Abaddon."[3]

[3]The postcard was not introduced during the guilt/innocence phase of the trial or at the penalty hearing. However, during the guilt/innocence phase, the trial judge permitted the State to introduce the fact that a postcard was found in the Kisner car and that this postcard was signed with Dawson's nickname. At the penalty hearing, the Court permitted testimony that the name on the card was "Abaddon."

Approximately one hour later, at 10:30 p.m., on December 1, 1986, Trooper Douglas Hudson ("Trooper Hudson") of the Delaware State Police, responded to a call to investigate a one-car accident on Sussex County Route 207. That accident involved a blue Ford LTD which had been driven across the road into a ditch. The vehicle sustained extensive damage to the left front quarter panel, the front window, and the grill. At approximately 3:55 a.m., the following morning, it was discovered that the Ford LTD had been stolen from a location in the vicinity of the Zoo Bar. A hat, similar to the one which Sergeant Hudson had seen on the person he had chased the previous evening, was found in the vehicle. This caused Trooper Hudson to begin a house-to-house search in the area for Dawson.

At 5:25 a.m., the police found Dawson hiding on the floor of a Cadillac, which was parked approximately three-tenths of a mile from the Route 207 accident scene. He had a cut on his ear and blood on his hands. He was wearing the black motorcycle jacket which had been stolen from the Seeneys. In the jacket pockets, the police found four of the pocket watches[4] that had been stolen from the Seeneys. Among the currency seized from Dawson was at least one two dollar bill. A cotton sock, which visually appeared to match the sock used to gag Madeline Kisner, was also taken from Dawson's pocket.

---

[4]Ryan provided the police with another of the stolen pocket watches. She said Dawson had given it to her.

Scientific Evidence

Retired FBI Special Agent Andrew Podolak ("Podolak") testified at trial about various fiber comparisons that he conducted on the items of evidence which had been submitted to the FBI laboratory. Podolak compared the white cotton sock found in Dawson's pocket with the sock used to gag Mrs. Kisner. He determined that the socks matched in all microscopic and optical properties as well as in color, composition and construction. In addition, Podolak found red triacetate fibers on both the black motorcycle jacket and the black tee shirt worn by Dawson, which matched in every observable microscopic and optical property, the red triacetate fibers found in Mrs. Kisner's robe.

Also testifying for the State were FBI serologists Joseph Errera and Randall Murch. They determined that blood found on Dawson's clothing contained genetic markers which were inconsistent with his own blood type but were consistent with Mrs. Kisner's blood type.

The defense presented three witnesses during the guilty/innocence phase of the trial. Dawson did not testify. On June 24, 1988, Dawson was found guilty as charged as to all counts.

Penalty Hearing

At the penalty hearing, the State presented the testimony of Cathy Guessford, a records custodian from the Delaware Correctional Center. Ms. Guessford related the details of Dawson's criminal history to the jury. This included Dawson's commitment to a juvenile correctional facility at age thirteen, five commitments or

recommitments to the Division of Juvenile Corrections dating from October 1968, the determination that he was not amenable to the Family Court processes, fourteen prior felony convictions, three escapes from maximum security juvenile institutions and three adult escapes, and twenty-four conduct violations resulting in sanctions against him as an inmate.

At the penalty hearing Dennis elaborated upon her encounter with Dawson on the evening of December 1st. She testified that Dawson identified himself to her as Abaddon and told her that the name meant "one of Satan's disciples." Detective Joseph Huttie ("Huttie") testified that Webster's dictionary defines Abaddon as "angel of the bottomless pit." Huttie testified that when Dawson was arrested, a photograph was taken showing the name Abaddon tattooed across Dawson's stomach. Huttie also testified that Dawson's right hand bore a tattoo with the words "Aryan Brotherhood" above and below a diamond shaped symbol. The State introduced a stipulation describing the nature of the Aryan Brotherhood.

The defense presented two family members as witnesses at the penalty hearing. The jury returned a verdict unanimously recommending the imposition of the death penalty on each of the four counts of Murder in the First Degree.

MOTION IN LIMINE

Prior to trial, Dawson's counsel learned that Dawson was a member of a prison group known as the Aryan Brotherhood. The record reflects that the Aryan Brotherhood is a white supremacist Nazi oriented gang. It originated at the San Quentin Prison in

California in response to perceived threats from racial minority gangs of inmates.[5] Dawson has tattoos on his body displaying the name of this organization, above and below what is allegedly one of its symbols. Dawson's counsel also became aware that Dawson has several swastikas tattooed on his body and, that while incarcerated, Dawson had painted a large swastika on one wall of his prison cell.

In view of the information concerning the Aryan Brotherhood and the swastikas, Dawson's counsel filed a pre-trial motion in limine. Dawson's counsel sought a ruling excluding all testimony relating to Dawson's membership in the Aryan Brotherhood. The motion also sought to prohibit the State from requesting that Dawson exhibit any of his tattoos to the jury. In response to Dawson's motion in limine, the State indicated that it was not inclined to introduce evidence relating to the Aryan Brotherhood

---

[5] THE COURT: Counsel, as a follow-up on your representation regarding the nature of your understanding of what the Aryan Brotherhood is, I conducted a nexus search using the term brotherhood and was able to determine from wire services and other news media accounts which describe the organization that the Aryan Brotherhood is a white supremacist Nazi oriented gang which first originated in San Quentin Prison in California. Its apparent motto: Kill to get in and die to get out.

In various prisons throughout the United States this gang has a reputed violence against black and Latino prison gangs. I found no indication as to the acts of violence against particular religious groups on the part of the Aryan Brotherhood.

during the guilt/innocence phase of Dawson's trial, but that it would seek to do so during the penalty hearing, if Dawson was convicted.

Dawson's counsel submitted to the Superior Court that, despite the State's response, a ruling on the admissibility of evidence concerning the Aryan Brotherhood was needed before jury selection began. Dawson's counsel argued that if a ruling was not made before trial, he would be forced to use his peremptory challenges to strike potential jurors who would otherwise be acceptable to Dawson.[6] The Superior Court declined to decide the merits of Dawson's motion in limine prior to trial. On April 8, 1988, the Superior Court ordered:

> the objections [raised by the defendant's in limine motion] shall be considered in the context of trial itself. The State shall not elicit the evidence objected to without prior notice to defense counsel and the [Superior] Court.

During a subsequent pretrial conference, Dawson's counsel asked the Superior Court to reconsider its April 8, 1988 ruling. However, the trial judge adhered to his prior decision stating:

> What I am saying is what I have already said. The State is prohibited from introducing any evidence or evidence relating to the Aryan Brotherhood without leave of the

[6]Specifically, Dawson's counsel indicated that he would like to have Blacks and Jews sitting on the jury, alleging sociologists have determined that these people are the most compassionate and understanding and, therefore, would be more inclined to acquit Dawson. Additionally, Dawson's counsel argued that if the sociologists are correct, these persons would be more likely to be against an imposition of the death penalty, if Dawson was found guilty. Thus, Dawson's counsel argued that he faced a dilemma in that, if the Superior Court failed to rule on the evidentiary issues in the motion in limine before trial, he would be forced to use peremptory challenges to strike Blacks and Jews.

> Court. I will judge its probative value and any defense balancing as necessary under Rule 403 in the context of what proceedings are at the time in which the evidence is offered.

In response to that reiterated ruling, Dawson's counsel requested that the Superior Court propound a voir dire question designed to identify potential jurors who might be improperly influenced by the introduction of the evidence about the Aryan Brotherhood. The State did not object to that motion by Dawson's counsel.[7] The Superior Court granted Dawson's request. Voir dire question #20, which was asked of prospective jurors, stated:

> "In this case there may be evidence relating to membership in an organization called the Aryan Brotherhood, a white supremacist group. Would this affect your ability to serve as a fair and impartial juror in this case?"

Dawson argues that the Superior Court committed reversible

[7]

> PROSECUTOR: Your Honor, if we could amplify our position a little bit. [Defense Counsel] has reiterated his concerns about the possible racial or religious undertones that may be kicked up, if you will, by references to Nazism or Aryan Brotherhood or any such references. We have maintained and continue to maintain our position that these are all reflective of the defendant's character should we get to the penalty phase and the evidence is relevant at that point.
>
> I just want to state for the record that with our sensitivity to [Defense Counsel's] perceived dilemma or problem that the jury may decide this penalty phase on something other than the evidence produced at the phase, at the penalty phase we are specifically sanctioning any questions that [Defense Counsel] wants to ask that probe that issue, that whatever voir dire he wants to get into that deals with that question we are amenable to.

error in declining to rule on the merits of his motion in limine prior to trial. "In limine" is defined as "[o]n or at the threshold; at the very beginning; [or] preliminarily." Black's Law Dictionary 787 (6th ed. 1990). The term is used "in a broad sense to refer to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." Luce v. United States, 469 U.S. 38, 40 n.2 (1984).

The State argues that a ruling on the merits of Dawson's motion in limine would not necessarily have constituted a final determination on the admissibility of evidence about the Aryan Brotherhood. Luce v. United States, 469 U.S. at 41. The State correctly points out that an in limine ruling is subject to change when the case unfolds. Id. "[E]ven if nothing unexpected happens at trial, the ... judge is free, in the exercise of sound judicial discretion, to alter a previous in limine ruling." Id. See also United States v. Masters, 840 F.2d 587, 590-91 (8th Cir. 1988); State v. Floyd, S.C. Supr., 369 S.E.2d 842 (1988); Gilliam v. State, Ind. Supr., 383 N.E.2d 297 (1988); State v. Fernandes, R.I. Supr., 526 A.2d 495 (1987). Compare United States v. Burkhead, 646 F.2d 1283 (8th Cir. 1981); State v. Lariviere, R.I. Supr., 527 A.2d 648, 649 (1987).

"Ordinarily, the determination of what evidence will be admitted is left to the discretion of the trial court." United States v. Burkhead, 646 F.2d at 1285; Strauss v. Biggs, Del. Supr., 525 A.2d 992, 997 (1987). Although this discretion is not

unbridled, it has generally included the option "to defer ruling on evidentiary issues until the evidence is actually offered for admission." Id. at 1286.

> The general rule permitting [a trial court] to delay evidentiary rulings is designed to prevent unnecessary and unwarranted advisory opinions. It is sometimes unwise to decide whether to admit evidence before it is actually presented. If no advance ruling is made, the parties may decide to abandon their positions for reasons unrelated to the anticipated ruling of the court. A refusal to rule may thus promote judicial economy. In other situations, a delayed ruling is advisable because the facts as they develop during the course of the proceeding may affect the determination of admissibility.

United States v. Burkhead, 646 F.2d at 1286.

The Superior Court decided that the issues presented by Dawson's motion in limine should be ruled upon within the context of the trial. However, the Superior Court prevented the disclosure of potentially prejudicial information to the jury by prohibiting the State from introducing any evidence relating to the Aryan Brotherhood without its prior permission. The Superior Court also permitted Dawson's counsel to propose specific voir dire questions to be asked of the venire panel, as an additional safeguard, to protect against an adverse ruling on the objection to evidence about the Aryan Brotherhood.

By acting in accordance with the general rule, the Superior Court's decision, with respect to Dawson's motion in limine, was an exercise of discretion. Under the circumstances of this case, we find that the Superior Court properly exercised its discretion. Although it declined to rule on the admissibility of evidence about the Aryan Brotherhood until the State requested permission to

introduce it at trial, the Superior Court granted Dawson's request for additional pre-trial voir dire about the Aryan Brotherhood, and it ordered the State not to refer to evidence about the Aryan Brotherhood without prior approval.

The Superior Court's action assured that the jury would not be improperly influenced during the trial if Dawson's objections to the evidence were sustained. By affording Dawson the pre-trial opportunity to expand the voir dire of the venire panel and by tailoring the voir dire questions to the circumstances of the case, the Superior Court protected Dawson against the seating of a juror, who might be biased by evidence about the Aryan Brotherhood, in the event Dawson's objections were overruled. Riley v. State, Del. Supr., 496 A.2d 997, 1007 (1985). The Superior Court's disposition of Dawson's motion in limine was responsive and effective.[1]

CHANGE OF VENUE

Prejudicial Pretrial Publicity

On May 22, 1987, Dawson's counsel filed a pre-trial motion for a change of venue. Super. Ct. Crim. R. 21(a). Dawson contended, in part, that extensive prejudicial pre-trial publicity precluded him from receiving a fair and impartial trial in Kent County, where the crimes had occurred. That motion was denied. Throughout the subsequent pre-trial proceedings, including the jury selection process, Dawson's counsel renewed his motion for a change of venue.

[1]The Superior Court ultimately concluded that the State could introduce evidence about the Aryan Brotherhood during the penalty phase of Dawson's trial. That decision was proper, for the reasons set forth in this opinion.

On each occasion, that motion was denied by the Superior Court.

A change of venue will be granted only upon a showing of reasonable probability of prejudice.[2] McBride v. State, Del. Supr., 477 A.2d 174, 185 (1984) (citing Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966)). To make such a showing, a defendant must present evidence of highly inflammatory or sensationalized pre-trial publicity sufficient for the court to presume prejudice. Riley v. State, 496 A.2d at 1014. In the absence of showing inherently prejudicial pre-trial publicity, the defendant must demonstrate actual prejudice through voir dire. Id. at 1015. Accord McBride v. State, 477 A.2d at 185-86. "Whichever path is chosen, the decision to grant or deny a request for change of venue is a matter for the reasonable exercise of the trial court's discretion." Riley v. State, 496 A.2d at 1015 (citing Parson v. Delaware, Del. Supr., 222 A.2d 326 (1966), cert. denied, 386 U.S. 935 (1967). Dawson asserted both bases for relief in his motion requesting a change of venue.

Initially, Dawson's counsel argued that the highly inflammato-

[2]Superior Court Criminal Rule 21(a) once provided, in pertinent part, that a change of venue of criminal prosecution to either of Delaware's two other counties is warranted if "there exists in the county where the prosecution is pending so great a prejudice against [defendant] that he cannot obtain a fair and impartial trial in that county." In McBride, this Court stated that Rule 21 "should be amended to eliminate the requisite showing by a defendant that there exists 'so great a prejudice against defendant that he cannot obtain a fair and impartial trial in that county.'" 477 A.2d at 185 (quoting Parson v. State, 275 A.2d 777, 785 (1971)). We directed that henceforth, "a change of venue [be granted] upon a showing that there exists a 'reasonable probability' or 'reasonable likelihood' of prejudice against a petitioner." 477 A.2d at 185; Riley v. State, Del. Supr., 496 A.2d 997, 1014 n.21 (1985). Superior Court Criminal Rule 21(a) was amended, as suggested, effective March 2, 1984.

ry and sensational nature of the pretrial publicity was sufficient to create a presumption that Dawson could not obtain a fair trial in Kent County. The record reflects that news of Dawson's escape and the murder of Madeline Kisner was broadcast on various television and radio stations serving Kent County. In addition, many articles concerning the prison escape and the murder appeared in both The News Journal and The Delaware State News, the two major papers of general circulation in Kent County.

The Superior Court reviewed the news media accounts submitted by Dawson's counsel, including an article printed in The News Journal on June 5, 1988, the day before jury selection was scheduled to begin. The Superior Court concluded that the news accounts were largely informational in scope and insufficient to give rise to a presumption of prejudice in the venire panel which had been summoned for jury duty. The record supports that decision. A rational factfinder could reasonably conclude that Dawson had not presented "evidence of highly inflammatory or sensationalized pre-trial publicity sufficient for the [Superior] [c]ourt to presume prejudice...." Riley v. State, 496 A.2d at 1014-15. Compare Rideau v. State of Louisiana, 373 U.S. 723 (1963); McBride v. State, Del. Supr., 477 A.2d 174 (1984). It is well established that routine pre-trial publicity of a criminal case will not justify granting a motion for change of venue. Riley v. State, 496 A.2d at 1014.

Alternatively, Dawson's counsel argued that, even if prejudice could not be presumed from the news media accounts, actual

prejudice was demonstrated during the voir dire of the venire panel. The record reflects that it took almost four full days to impanel the jury. During this time, there was individual voir dire of one hundred thirty persons, from two jury panels, before the jury of twelve and the four alternates were chosen. At the beginning of the Superior Court's session each day and at the end of the jury selection process, Dawson's counsel presented the trial judge with his own statistical evaluation, which demonstrated that a high percentage of the potential jurors indicated they "had some knowledge or read something in the newspaper about the case."[10] The Superior Court was not persuaded to grant the motion for a

---

[10]The statistics presented by Dawson's counsel indicated:

	Panel I			Panel II		
	Day 1	Day 2	Day 3	Day 3	Day 4	TOTAL
Peremptory: Dawson	8	10	2	3	4	27
Peremptory: State	2	4	6	1	2	15
Excused by Court	3	7	2	3	9	24
Challenges for Cause	7	21	9	4	7	48
Jurors Chosen	3	3	4	0	6	16
Total Jurors	23	45	23	11	28	130
Number who had knowledge of case:	12	29	16	4	16	77
Percentage who had knowledge of case:	52.17%	64.44%	69.56%	36.36%	57.14%	59.23%
Adjusted Percentage of those who had knowledge of case:	63.15%	80.55%	76.19%	57.14%	80.00%	74.75%

Dawson's counsel arrived at the "adjusted percentage of those who had knowledge of the case" by excluding those jurors who were excused prior to being asked that question.

change of venue on the basis of that statistical analysis.[11]

The accused's right to a trial by a jury of his peers is fundamental to our criminal justice system. Irvin v. Dowd, 366 U.S. 717, 721 (1961). An essential ingredient of that right is that the jury consist of impartial jurors. See Turner v. Louisiana, 379 U.S. 466 (1965); In re Oliver, 333 U.S. 257 (1948). However, the right to a fair trial by a panel of impartial, "indifferent jurors," does not require that "the jurors be totally ignorant of the facts and issues involved." Irvin v. Dowd, 366 U.S. at 721-22.

"Impartiality is not a technical conception. It is a state of mind." United States v. Wood, 299 U.S. 123, 145 (1936). Prior knowledge of the facts and issues of the case, or even a preconceived notion of guilt or innocence, will not automatically disqualify a prospective juror "if the juror can lay aside his impression or opinion and render a verdict based upon the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 723 (1961); Dutton v. State, Del. Supr., 452 A.2d 127, 137 (1982).

The Constitution lays down no particular test and there is no

---

[11]The statistical analysis presented by Dawson's counsel is similar to that relied upon in Irvin v. Dowd, 366 U.S. 717 (1961). However, the facts in Irvin are readily distinguishable from the facts in Dawson's case. In Irvin, eight of the twelve jurors, or 66% of those finally seated, indicated prior to trial that in addition to being familiar with the facts and circumstances surrounding the case, they thought that the defendant was guilty. Id. at 727. The voir dire record in Irvin showed that 90% of the jury panel members (excluding 10 who were never asked) had some opinion as to guilt ranging in intensity from mere suspicion to absolute certainty. Id.

ancient and artificial formula for ascertaining a juror's mental attitude of "appropriate indifference." Irvin v. Dowd, 366 U.S. 717, 724-25 (1961). However, the method that has been consistently relied upon historically to ascertain a juror's mental attitude is voir dire. Patton v. Yount, 467 U.S. 1025, 1038 (1984) (citing United States v. Burr, 25 F.Cas. No. 14,692g, p. 49, 51 (No. 14,692g) (CC Va.1807) (Marshall, C.J.)). The purpose of voir dire examination is to provide the court with sufficient information to decide whether prospective jurors can render an impartial verdict, based upon the evidence developed at trial, and in accordance with the applicable law. Dutton v. State, 452 A.2d at 136; Parson v. State, Del. Supr., 275 A.2d 777, 780 (1971).

The fact that a high percentage of prospective jurors had some knowledge of information about Dawson's case did not establish per se that an impartial jury could not be impanelled in Kent County. See Smith v. Phillips, 455 U.S. 209 (1982). However, the situation did require the trial judge, through a careful use of voir dire, to determine

> "what information each juror ha[d] heard or read, the source of the information and how it ha[d] affected his or her attitude toward the defendant and the case at hand. It is only after acquiring such knowledge that the judge is in a position to accurately evaluate a juror's responses and his eligibility to serve."

Hughes v. State, Del. Supr., 490 A.2d 1034, 1042-43 (1985).

Defendants in capital cases have a right to have jurors questioned individually in order to intelligently determine who should be challenged for cause and who should be challenged peremptorily. Steigler v. State, Del. Supr., 277 A.2d 662 (1972),

vacated in part, 408 U.S. 939 (1972).[12] The applicable Delaware statute provides:

> When a juror is called in a capital case, he shall be first sworn or affirmed upon the voir dire and then asked, under the direction of the court, if he has formed or expressed any opinion in regard to the guilt or innocence of the prisoner at the bar ... If his answer to the question be in the affirmative, he shall be disqualified to sit in the case, unless he shall say, upon his oath or affirmation, to the satisfaction of the court, that he feels able, notwithstanding such an opinion, to render an impartial verdict upon the law and the evidence, in which event he shall be a competent juror, if not otherwise disqualified, challenged, or excused.

11 Del. C. § 3301. In Dawson's case, the voir dire examination of the venire panel was conducted individually. After following the requirements of the Delaware statute and the holdings of Dowd, the Superior Court concluded that each juror who was seated in Dawson's case could "lay aside his or her impression[s] or opinion[s] and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U.S. at 723 (citations omitted).

The trial court's finding of impartiality is entitled, even on direct appeal, to "special deference." Irvin v. Dowd, 366 U.S. at 724; Patton v. Yount, 467 U.S. 1025 (1984). However, the trial court's finding of juror impartiality, notwithstanding prior knowledge or impressions, "cannot foreclose inquiry as to whether, in a given case, the application of [the] rule [of Dowd] works a

---

[12]This Court, the Third Circuit Court of Appeals, and the ABA Standards Relating to Fair Trial and Free Press all recommend individual voir dire in non-capital cases involving "possible juror exposure to prejudicial information." See U.S. v. Addonizio, 451 F.2d 49, 67 (3d Cir. 1972), cert. denied, 405 U.S. 936 (1972); Hughes v. State, 490 A.2d 1034, 1043 n.7 (1985); The ABA Standards Relating To Fair Trial and Free Press § 3.5.

deprivation of [the defendant's] life or liberty without due process of law." Irvin v. Dowd, 366 U.S. at 723. When appropriate, as in highly publicized cases, this Court has a duty to independently evaluate the voir dire testimony of the impanelled jurors. Id.; Hughes v. State, 490 A.2d at 1041.

The standard for appellate review of this issue is set forth in Irvin v. Dowd. The trial court's finding of impartiality "ought not be set aside by the reviewing Court unless the error is manifest." Irvin v. Dowd, 366 U.S. at 723. The trial judge is in a unique position to evaluate jurors' assurances of impartiality because demeanor plays a crucial role in the determination of impartiality. Hughes v. State, 490 A.2d at 1041; Patton v. Yount, 467 U.S. 1025 (1984); Dutton v. State, Del. Supr., 452 A.2d 127, 137 (1982). A juror may not be able to speak for his own bias simply because he is unaware of its existence. Smith v. Phillips, 455 U.S. 209, 221-22 (1982). See also Patton v. Yount, 1025 U.S. at 1031; Young v. State, Del. Supr., 407 A.2d 517, 520 (1979).

In Dawson's case, the trial judge conducted a voir dire "examination designed to elicit answers which [would] provide an objective basis for his evaluation" of each juror. Gray v. State, Del. Supr., 441 A.2d 209, 219 (1982) (citing Young v. State, Del. Supr., 407 A.2d 517, 521 (1979), cert. denied, 446 U.S. 940 (1980)). The trial judge did not merely "go through the motions." Id. The record reflects that the trial judge's determination of impartiality was made in Dawson's case only after an extended individual voir dire proceeding designed specifically to identify

biased veniremen. Patton v. Yount, 467 U.S. at 1038. Compare Hughes v. State, Del. Supr., 490 A.2d 1034 (1985); Parson v. State, Del. Supr., 275 A.2d 777 (1971). "It is fair to assume that the method we have relied on since the beginning, e.g., United States v. Burr, ... usually identifies bias." Patton v. Yount, 467 U.S. at 1040.

The party seeking a change of venue has the "burden of tendering cogent proof that a fair trial could not be had in the county in which the indictment was returned." McBride v. State, Del. Supr., 477 A.2d 174, 184 (1984). Neither the voir dire testimony or the record of pre-trial publicity in Dawson's case reveal the "wave of public passion" that would have made a fair trial unlikely in Kent County. Patton v. Yount, 467 U.S. at 1040; Murphy v. Florida, 421 U.S. 794, 800 (1975); Irvin v. Dowd, 366 U.S. at 728; Hughes v. State, 490 A.2d at 1046. After an independent evaluation, we conclude that Dawson has not demonstrated a "reasonable probability" or "reasonable likelihood" of prejudice against him, by the jury that was impaneled as a whole, in Kent County. McBride v. State, 477 A.2d at 185. We find no manifest error in the Superior Court's decision to deny Dawson's motion for a change of venue, based upon prejudicial pre-trial publicity. Irvin v. Dowd, 366 U.S. at 723-24.

Capital Punishment in Kent County

Dawson's counsel also contends that the motion for a change in venue should have been granted by the Superior Court because, he was able to show, by a statistical analysis, that "it is far more

likely that any defendant found guilty of murder in the first degree will receive the death sentence in Kent County than in New Castle County or Sussex County." Dawson's counsel argues that his statistical evidence demonstrates an element of arbitrariness in the penalty determination process in Delaware, which is unconstitutional under the Eighth Amendment of the United States Constitution. See Gregg v. Georgia, 428 U.S. 153, 188 (1976); Furman v. Georgia, 408 U.S. 238 (1972). The statistical evidence upon which Dawson relies is that:

> since May 14, 1977, the effective date of [Delaware's] death penalty statute, and until 1986, there had been a total of one hundred eight (108) First Degree Murder indictments in New Castle County, forty (40) in Kent County, and forty (40) in Sussex County. Of the seven defendants currently under a sentence of death, six have been sentenced by Kent County juries. Kent County, with only twenty-one percent of the murder indictments for the State, is thus responsible for eighty-three percent of the death sentences.

Dawson argues that the foregoing statistics demonstrate that Kent County juries appear "uncommonly willing to condemn a man to die." Witherspoon v. Illinois, 391 U.S. 510, 521 (1968).

The State submits that the statistical evidence upon which Dawson bases his claim is inadequate. The State argues that Dawson's analysis fails to address several important variables, inter alia: the number of cases in which the death penalty was sought in each county; the number of cases in which a penalty hearing was actually conducted in each county; variations in the nature and circumstances of the various cases in which a penalty hearing was held in each county; and variables in the character and propensities of defendants in each case in which a penalty hearing

was held in each county. Additionally, the State points out that, apart from his own case and one other,[13] Dawson does not contend that any of the death sentences imposed in Kent County were unwarranted.

In ruling upon this aspect of Dawson's motion for a change of venue, the Superior Court stated:

> [The] defendant has failed to carry his ultimate burden of persuasion on this issue. His statistical method has not accounted for all the neutral variables unrelated to venue in each of the capital crimes which could have produced the same result. Nor has his method accounted for all of the neutral variables unrelated to venue in the character and propensities of each capital defendant which could have produced the same result.

In addition, the Superior Court stated:

> Moreover, [the] defendant's argument that Kent County juries are "uncommonly willing to condemn a man to die" fails even using his deficient statistical method. Of the last three Kent County first-degree murder cases involving a capital penalty phase, each has resulted in a life sentence. See State v. Shipley, State v. Graham, and State v. Thompson.

Dawson's statistical argument must be viewed in the context in which it is raised. McCleskey v. Kemp, 107 S.Ct. 1756, 1769 (1987). Dawson "challenges decisions at the heart of the criminal justice system." Id. "[O]ne of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder." Id. (citing Gregg v. Georgia, 428 U.S. 153, 226 (1976) WHITE, J., concurring). The implementation of these laws, by

[13]State v. Sanders, Del. Super., No. IK86-03-0898-0903, is a case presently pending before this Court, in which a Kent County jury found a defendant guilty but mentally ill and recommended the imposition of the death sentence.

necessity, requires discretionary judgments. Id.

The unique nature of the decisions at issue in the criminal laws against murder require caution before an inference is adopted based upon a statistical study. Id. Because discretion is essential to the criminal justice process, this Court, like the United States Supreme Court, demands exceptionally clear statistical proof before we would infer that the discretion accorded to juries in capital cases has been abused. Id. See DeShields v. State, Del. Supr., 534 A.2d 630, 646 (1987). We hold that Dawson's study is clearly insufficient to support an inference that an element of arbitrariness was introduced into his case by having his penalty hearing before a Kent County jury. Id. The Superior Court's decision denying Dawson's motion for a change of venue, on the basis of the deficiencies in his statistical presentation, is affirmed. Id.

JUROR CHALLENGES

In addition to challenging the Superior Court's finding of impartiality concerning the Kent County venire panel collectively, Dawson contends that several of the Superior Court's decisions regarding individual jurors were erroneous. Dawson's argument concerning the rulings is three-fold. First, he contends that he was forced to use eight peremptory challenges, when the trial judge abused his discretion in refusing to excuse certain prospective jurors for cause.[14] Second, he contends that two of the jurors who

[14]Dawson's counsel had prepared a chart to illustrate the peremptory challenges he exercised when his challenges for cause (continued...)

served, Buel Parrish ("Parrish") and Francis Angel ("Angel") should have been excused for cause. Third, he contends that the trial judge's refusal to grant him additional peremptory challenges denied him the opportunity to strike Parrish, Angel and a third juror, Doris A. Duerr ("Duerr").

Dawson's first contention is that the Superior Court's failure to excuse eight jurors for cause required him to challenge each of them peremptorily, thereby violating his right to a trial by an impartial jury. U.S. Const. amend. VI and XIV. In addressing this

---

[14](...continued)
were denied.

Prospective Juror	Prospective Juror Number	Dawson's Peremptory	Challenge For Cause Requested By Dawson
1. Michael D. Shahan (A099-109)	10	3	Yes (A-106)
2. Jessie M. Shannon (A-109-122)	11	4	Yes (A-285-286, 291-296)
3. Charles S. Coverdale (A-235-249)	30	10	Yes (A-243-247)
4. Sylvia W. Cooper (A-291-298)	41	12	Yes (A-297)
5. Andrew J. Fox (A-316-324)	46	14	Yes (A-322)
6. Mary F. Harris (A-338-345)	52	15	Yes (A-344)
7. Orrie W. Dean (A-382-392)	61	17	Yes (A-391)
8. Donna J. Couden (A-457-465)	73	19	Yes (A-464)

argument, it is not necessary to determine the merits of the Superior Court's rulings which denied Dawson's challenges for cause. The United States Supreme Court has held that the "loss of a peremptory challenge," to cure a trial court's error in not dismissing a juror for cause, does not constitute a violation of the constitutional right to an impartial jury. Ross v. Oklahoma, 108 S.Ct. 2273, 2278 (1988). "[P]eremptory challenges are not of constitutional dimension. They are a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean that the Sixth Amendment was violated." Id. See also, DeShields v. State, Del. Supr., 534 A.2d 630, 636 (1987).

The focus of Dawson's second contention is, quite properly, on the jurors who were seated to hear his case. Ross v. Oklahoma, 108 S.Ct. 2273 (1988). At trial, and on appeal, Dawson argues that two of these jurors, Parrish and Angel should have been excused for cause. According to Dawson, the Superior Court's failure to excuse Parrish and Angel, at a time when he had no peremptory challenges remaining, resulted in their service as jurors, in violation of his right to a fair trial by an impartial jury. Irvin v. Dowd, 366 U.S. 717 (1961).

Dawson has three factual bases for his argument that Parrish should have been excused for cause. First, Dawson contends the fact that Parrish is Black raises the "potential" of racial prejudice, due to the admission of evidence about the Aryan

Brotherhood. Second, Dawson questions Parrish's impartiality because, contrary to the Superior Court's written instructions to the entire venire panel, Parrish read a portion of a newspaper article about the case. Third, Dawson argues Parrish should have been excused because his brother was the victim of an unsolved murder in Philadelphia.

The record reflects that, in fact, Parrish was the only Black person seated on the jury. During voir dire, Parrish stated that evidence relating to the Aryan Brotherhood, a white supremacist group, would not affect his ability to be fair and impartial.[15] During voir dire, Parrish also disclosed that his brother had been the victim of an unsolved murder in Philadelphia in approximately 1978.[16] Parrish stated that this would not affect his ability to decide Dawson's case impartially.[17] In addition, during voir dire,

---

[15] Q. In this case there may be evidence relating to membership in an organization called the Aryan Brotherhood, a white supremacist group. Would this affect your ability to serve as a fair and impartial juror in this case?

A. No, sir, it wouldn't.

[16] We note that this Court has previously found no abuse of discretion when a trial judge declined to ask prospective jurors whether they or their families had been victims of a violent crime. McBride v. State, Del. Supr., 477 A.2d 174, 190-91 (1984); and Jacobs v. State, Del. Supr., 358 A.2d 725, 728 (1976).

[17] Q. Have you or a relative or close friend of yours ever been the victim of a crime of violence?

A. Yes, sir.

Q. Where, when and what type of crime?

(continued...)

Parrish disclosed that he unintentionally read part of a newspaper account, in violation of the Court's order not to read anything concerning the Dawson case prior to the completion of jury selection. However, Parrish said when he realized the article pertained to the Dawson case, he stopped reading it.[18] Parrish

---

[17](...continued)

A. My brother was murdered about ten years ago in Philadelphia.

Q. Were you interviewed by any member of any law enforcement agency.

A. No, sir. I was away in the military at the time.

Q. Was there a prosecution of the offense?

A. No, sir.

Q. Was any arrest made?

A. No, sir.

Q. As a result of that circumstance, do you have any bias for or against the defendant in this case?

A. No, sir, I don't.

Q. As a result of that, do you have any bias or prejudice for or against the State in this case?

A. No, sir.

[18] Q. Have you read or heard anything concerning this case through the news media, television, radio, newspapers or any other source?

A. I did happen to see a blurt yesterday in yesterday's papers after yesterday afternoon.

Q. What did you see in yesterday's paper?

A. Something concerning the trial, about Mr. Dawson's trial. It was about a seven, eight line paragraph in the paper.

(continued...)

[18](...continued)

Q. Did you read the article?

A. I'm afraid I did.

Q. Did you receive the Court's instruction dated May 10th with the jury summons that instructed you not to read, view or listen to any reports in the press, radio or television about the case?

A. Yes, sir, I did.

Q. Do you have any explanation for your disregard of that?

A. Well, it was unintentional. I had to read it before I realized what had happened. It was just an oversight.

Q. Before you finished the article, did you realize it was about this case?

A. Yes, sir, I did.

Q. You continued to read it?

A. No, I stopped reading after I realized what it was.

Q. What do you recall the article saying?

A. Just saying something about jury selection for the Dawson trial. That's when I stopped reading.

Q. Did you read the entire article or not?

A. No, sir, I did not read the entire article.

Q. Have you read or hearing anything else about this case at any other time through the news media or any other source?

A. No, sir, I haven't.

Q. Did you discuss with anyone else anything that you read or heard about this case?

A. No, sir.

(continued...)

said he had formed no opinion of Dawson's guilt or innocence as a result of what he read.

Dawson contends that Angel should have been excused for cause, as a consequence of his exposure to pretrial publicity.[19] During voir dire, Angel stated that he had read about the incident "when it first happened." He remembered that it occurred in Kenton and that "some lady got killed." He also related that he had discussed what he had read with his wife. In response to the trial judge's voir dire inquiry, Angel stated that he had not formed an opinion

[18](...continued)

Q. Have you formed any opinion as to the guilt or innocence of the defendant in this case as a result of what you read or heard through the news media or discussed with anyone else?

A. No, sir, I have not.

Q. Would anything you read or heard through the news media or elsewhere make it difficult for you to render a fair and impartial decision in the case based solely on the evidence introduced at the trial and the instructions given you by the Court?

A. No, sir, it wouldn't.

[19]On appeal, Dawson also argues that Angel should have been excused for cause since he stated that he believed in the death penalty. However, there was no request for supplemental inquiry on this point during voir dire and it was not part of the basis on which Dawson challenged Angel for cause. Supr. Ct. R. 8. Nevertheless, the law is clear that a belief in the death penalty cannot ipso facto disqualify a juror from service in a capital murder case. Wainwright v. Witt, 469 U.S. 412 (1985). "The proper standard for determining when a prospective juror may be excused for cause because of his or her views on capital punishment ... is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Id. at 424. See also DeShields v. State, 534 A.2d at 634. Angel swore that he could adhere to his oath and be fair and impartial.

regarding Dawson's guilt or innocence and would be able to render a fair and impartial verdict, solely upon the basis of the evidence presented at trial.

The trial court has broad discretion in determining whether a prospective juror should be excused for cause. Parson v. State, Del. Supr., 275 A.2d 777 (1971). Determinations of juror impartiality are the responsibility of the trial judge who has the opportunity to question the jurors, observe their demeanor, and evaluate the ability of the jurors to render a fair and impartial verdict. DeShields v. State, 534 A.2d at 636; Williams v. State, Del. Supr., 494 A.2d 1237, 1243 (1985). Since the trial court's finding of impartiality will rest on the judge's personal observation of the voir dire proceedings and on the judge's impression regarding the credibility of the jurors, a reviewing court should give those findings great deference. DeShields v. State, 534 A.2d at 636.

The record reflects that the Superior Court questioned Parrish and Angel specifically, during their individual voir dire, about each of the areas of Dawson's concern. The Superior Court personally assessed Parrish's and Angel's unequivocal assertions of their ability to serve impartially and found each of them to be credible. DeShields v. State, 534 A.2d at 636; White v. State, Del. Supr., 404 A.2d 137, 139-40 (1979). On this record, we find no abuse of discretion in the Superior Court's decision not to strike either Parrish or Angel for cause. DeShields v. State, 534 A.2d at 636.

In his third argument relating to the jury selection process, Dawson contends that he was denied a fair trial by the Superior Court's rejection of his request for additional peremptory challenges. Dawson asserts that the Superior Court's refusal to grant him additional peremptory challenges denied him the opportunity to strike not only Parrish and Angel, but also Duerr. Dawson's counsel asserts that his own trial notes indicate he would have used a peremptory challenge to strike Duerr, if he had one to exercise. Since Duerr was not challenged for cause, Dawson's argument with regard to her service as a juror is based solely upon the Superior Court's peremptory challenge rulings.

In March, 1988, following a preliminary hearing, Dawson's counsel filed a motion for additional peremptory challenges. Dawson's counsel argued that because the evidence would be highly inflammatory and because of the manner in which the case had been reported by the media, the twenty (20) peremptory challenges allowed under Superior Court Criminal Rule 24(b)2 would "in all probability be insufficient to adequately permit counsel to select an impartial jury." On April 8, 1988, the Superior Court denied that motion "without prejudice to renewal at jury selection."

On the third day of jury selection, after Dawson's counsel had exercised his twentieth and last peremptory challenge, he renewed the motion for additional peremptory challenges. Although the trial judge denied Dawson's renewed motion for additional peremptory challenges, he indicated that the issue could be raised again, should it be necessary to go beyond the initial group of ninety-two

prospective jurors in order to seat the jury.[20] Dawson contends that this ruling constitutes reversible error.

Peremptory challenges are not constitutionally required. Ross v. Oklahoma, 108 S.Ct. at 2278-79 (internal quotation omitted); Jackson v. State, Del. Supr., 374 A.2d 1 (1977). Consequently, peremptory challenges exist as a matter of privilege. Hickman v. State, Del. Supr., 431 A.2d 1249, 1250 (1981). The purpose, the manner of use, and the number of peremptory challenges allowed are determined by State law. Ross v. Oklahoma, 108 S.Ct at 2279. Accordingly, the denial of Dawson's request for additional peremptory challenges must be reviewed in the context of Delaware's law on the subject.

Superior Court Criminal Rule 24(b) provides that multiple defendants in capital cases shall be entitled to a total of twenty peremptory challenges, not twenty each. Hickman v. State, 431 A.2d at 1250. Superior Court Criminal Rule 24(b) reads, in pertinent part, as follows:

> In capital cases the State shall be entitled to 12 peremptory challenges and the defendant or defendants shall be entitled to a total of 20 peremptory challenges. ...
>
> If there is more than one defendant, the Court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

---

[20]After the initial ninety-two potential jurors had been exhausted, a second group of potential jurors had to be called in order to seat a full jury, including the four alternates. Before jury selection from the second group proceeded, the Superior Court granted five additional peremptory challenges to Dawson and three to the State. Dawson does not challenge that ruling or any other portion of the jury selection process involving this second group of jurors.

Super. Ct. Crim. R. 24(b) (emphasis added). In this case, since he was tried alone, Dawson received all twenty of the peremptory challenges provided for in Rule 24. In effect, Dawson contends that this Court should find the trial judge abused his discretion by following Rule 24 precisely, at least through the first panel of prospective jurors.

We find that Dawson has been "unable to establish either abuse of discretion or actual prejudice" as a result of the Superior Court's decision not to grant him additional peremptory challenges. DeShields v. State, 534 A.2d at 636. The record reflects that the Superior Court complied with the mandatory requirements of Rule 24(b) and afforded Dawson twenty peremptory challenges. Id. The record also reflects that no antagonistic juror was seated, after Dawson had exercised all of his peremptory challenges. Id. The Superior Court's decision not to grant Dawson additional peremptory challenges, until after the first jury panel had been exhausted, is affirmed. Id.; Super. Ct. Crim. R. 24(b).

EVIDENCE OF EARLIER BURGLARY

Dawson was tried on thirteen counts of a fifteen-count indictment. Two counts of the indictment charged Dawson with Burglary in the Second Degree and Misdemeanor Theft at the Seeney home, a brief time before the murder of Madeline Kisner. Dawson entered a guilty plea to those charges prior to trial.

The State offered evidence of the Seeney burglary, during the guilt/innocence phase of Dawson's trial. With that evidence, the State sought to establish that Dawson was in the Kenton area at the

time Madeline Kisner was murdered. Dawson acknowledges that evidence establishing that he was within one-half mile of the Kisner home on the morning of Madeline Kisner's murder was relevant to the State's case. However, Dawson submits that the Superior Court erred in admitting evidence that he burglarized the Seeney residence, while he was in the Kenton area.

In the Superior Court, Dawson argued that evidence of this "other crime" at the Seeney residence was inadmissible according to D.R.E. 404(b). Alternatively, Dawson argued that, if the evidence of the Seeney burglary was not precluded by D.R.E. 404(b), it was nevertheless inadmissible, because the probative value of that evidence was outweighed by its prejudicial nature. D.R.E. 403. The State argued that the evidence of this "other crime" was admissible as an integral part of the immediate context of the crimes for which Dawson was being tried, and, therefore, was not governed by Rule 404(b). United States v. Bass, 794 F.2d 1305, 1312 (8th Cir. 1986).

The Superior Court assumed, without deciding, that D.R.E. 404(b) was applicable to the State's request to introduce evidence of the Seeney burglary. The Superior Court articulated two reasons for its decision. First, it concluded that even if the State's position was correct, and evidence of the Seeney burglary was not within the scope of 404(b), Rule 403 nevertheless required the Court to determine if the probative value of the evidence was outweighed by its prejudicial nature. Second, the Superior Court decided to "give Dawson the benefit of all protections afforded by

the Delaware Uniform Rules of Evidence."

After articulating the basis for its analysis, the Superior Court carefully applied the guidelines set forth by this Court in Getz v. State, Del. Supr., 538 A.2d 726 (1988). In doing so, the Superior Court stated, in part:

> The probative value of the evidence must be balanced against the danger of unfair prejudice. In the course of this case the defense has stated it does not dispute the Kisner burglary; thus, there is no danger here that the jury may unfairly infer the defendant committed the Kisner burglary merely because of the Seeney burglary.
>
> The Seeney burglary was a property crime that is not inflammatory in nature. The jury has already heard testimony relating to various thefts of automobiles which also were not inflammatory.
>
> I am satisfied that the precautionary instructions are likely to be effective in limiting the purpose for which the evidence may be used. I therefore conclude that the probative value is not substantially outweighed by the danger of unfair prejudice to the defendant.

We find no abuse of discretion. The record supports the Superior Court's conclusion that the probative value of the evidence of the Seeney burglary was not outweighed by its prejudicial nature. The Superior Court's decision which permitted the State to introduce evidence of the "other crimes" by Dawson at the Seeney residence with an appropriate precautionary instruction to the jury, is affirmed.[21] Getz v. State, Del. Supr., 538 A.2d 726

---

[21]The following precautionary instruction was given to the Dawson jury:

> "Evidence has been offered concerning [Dawson's] participation in a burglary and theft from the residence of Frank and Dorothy Seeney. This evidence has been offered for a limited purpose. You may not use that evidence as proof that the defendant was a bad person and therefore

(continued...)

(1988).

EVIDENCE OF TWO CAR THEFTS

At trial and on appeal, Dawson asserts that the Superior Court erred in permitting the State to introduce evidence concerning the theft of two motor vehicles. During the guilt/innocence phase of Dawson's trial, the State presented evidence to show that McCoy, Nave and Irwin, who escaped from the Delaware Correctional Center with Dawson, stole a car in Smyrna and travelled north in it. That car, a 1965 Mustang, was stolen from the northern part of the Town of Smyrna prior to 5:45 a.m. It was found abandoned just south of Fieldsboro that same morning. McCoy's fingerprint and Nave's address book were recovered from the vehicle. Only McCoy, Nave and Irwin were observed in Fieldsboro by Dill, in the early morning hours of December 1, 1986.

The State also offered evidence to show that another vehicle was stolen from Smyrna contemporaneously with the theft of the 1965 Mustang. That other vehicle, a 1979 Oldsmobile Starfire, was stolen from the opposite side of the town of Smyrna. After it was stolen, the 1979 Starfire was first noticed, between 8:00 and 9:00 a.m., near the Town of Kenton, west of Smyrna.

Dawson argues that the theft of the 1965 Mustang by McCoy, Nave and Irwin was not relevant to any issue in his case. Dawson also submits that there was no direct evidence connecting him to

---

[21](...continued)
probably committed the offenses he is charged with. You may use the evidence only to help you in deciding whether the defendant was the person who committed the offenses charged in the indictment now on trial.

the theft of the 1979 Oldsmobile Starfire. The State contends that the evidence of both car thefts was material to a central issue in the trial, i.e., whether Dawson, or someone else, killed Madeline Kisner. The State submits that this issue was framed at the outset of the trial by Dawson's counsel in his opening statement to the jury.[22]

---

[22]You are going to hear certain evidence which is not in dispute. There will be evidence and the defendant does not dispute the fact that on December 1st, 1986 he escaped from the Department of Correction in Smyrna, Delaware. There will be evidence and the defendant does not dispute the fact that on the morning of December 1st, 1986 he was inside the Kisner home and that he didn't have permission to be there. There will be evidence and the defendant does not dispute the fact that he stole some coins from the Kisner home.

There will be evidence and the defendant does not dispute the fact that he tied Madeline Kisner's hands with her shoe strings and there will be evidence and the defendant does not dispute the fact that he stole Madeline Kisner's car that day, but, ladies and gentlemen, the fact that David Dawson might be an escapee, the fact that David Dawson might be a thief, doesn't automatically mean, ladies and gentlemen, that he is a murderer, and that sounds bad, doesn't it?

You are also going to hear evidence, ladies and gentlemen, that the statement which Mr. Dawson gave which will tell you that on the first of December, '86 that when he escaped he escaped with the three other individuals: Mark McCoy, Larry Nave and Richard Irwin. There will be evidence that the individuals separated sometime on December 1st, '86 and that these three individuals were subsequently captured on or about December 23rd far away in or near Arizona.

There will be evidence when defendant gave his statement on January 8, 1987 he indicated that he was in the home of Mrs. Kisner and he tied Mrs. Kisner and he will further indicate to you in that statement that when he left the Kisner home to get gas that Nave, McCoy and Irwin were in that house and that when he left Mrs. Kisner was alive and when he returned Mrs. Kisner was dead, and his three friends were gone and when you look at that statement and you read that statement you are going to see that his reaction at that time was that he cried, he collapsed, he touched the bloody body of Mrs. Kisner.

In his opening statement, Dawson's counsel represented that Dawson would not dispute the evidence that he was in the Kisner residence, that he stole money from Madeline Kisner, that he bound her hands with her shoe strings and that he stole her car. However, Dawson's counsel also told the jury that they would hear evidence, in the form of a statement given by Dawson to the police, that he left Madeline Kisner alive in her residence with the other three escapees, McCoy, Nave and Irwin. According to Dawson's statement to the police, when he returned to the Kisner home, Madeline Kisner was dead and the other escapees were gone.

The Superior Court ruled that the State was entitled to introduce evidence that the other three escapees travelled together in the stolen 1965 Mustang in the opposite direction of the Kisner home. The Superior Court also ruled that the State could introduce direct and circumstantial evidence to support its contention that Dawson had an independent means of transportation to the vicinity of the Kisner home via the 1979 Oldsmobile Starfire. Renzi v. State, Del. Supr., 320 A.2d 711 (1974); Henry v. State, Del. Supr., 298 A.2d 327, 330 (1972); D.R.E. 404(b). The record reflects the relevancy of the evidence of both car thefts, in view of Dawson's defense that the other escapees had murdered Madeline Kisner. D.R.E. 402. We find no abuse of discretion in these evidentiary rulings by the Superior Court.[23]

---

[23]We note that Dawson's statement to the police was not introduced into evidence by either party, and that Dawson did not testify. Nevertheless, the State had the burden of proving the charges against Dawson and was entitled to present evidence that (continued...)

PROSECUTORIAL DISCRETION TO SEEK CAPITAL PUNISHMENT

Dawson argues that his death sentence should be commuted to life imprisonment, without the possibility of probation or parole, because penalty hearings were not held in other cases for defendants who were also convicted of Murder in the First Degree. According to Dawson, the current Delaware practice, whereby penalty hearings are not held following all first degree murder convictions, gives the prosecutor unbridled discretion in choosing cases in which to seek a death sentence.

Following a conviction of Murder in the First Degree, the Delaware statute requires the jury to make two unanimous determinations: first, that at least one statutory aggravating factor is present; and second, that a sentence of death be imposed, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense, and the character and propensities of the offender. 11 Del. C. § 4209. Consequently, during a penalty hearing, the prosecutor must prove the existence of both statutory requirements, beyond a reasonable doubt, to the jury's unanimous satisfaction.

"Although the prosecutor operates within an adversary system, his duty is to seek justice, not merely convictions." Sexton v. State, Del. Supr., 397 A.2d 540, 544 (1979). Similarly, the duty to seek justice requires the prosecutor to refrain from proceeding

---

[23](...continued)
Dawson was alone when he murdered Madeline Kisner during its case-in-chief.

with a death penalty hearing, if the prosecutor makes an independent good faith determination that the State cannot meet its statutory burden of proof. "The capacity of prosecutorial discretion to provide individualized justice is 'firmly entrenched in American law.'" McCleskey v. Kemp, 107 S.Ct. 1756, 1777 (1987) (quoting 2 W. LaFave & D. Israel, Criminal Procedure § 13.2(a), p. 160 (1984)). The United States Supreme Court has recognized that "a prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case." Id. At the same time, that Court recognized "the power to be lenient [also] is the power to discriminate," ... but a capital-punishment system that did not allow for discretionary acts of leniency "would be totally alien to our notions of criminal justice." Id.

The question raised by Dawson is whether historically in Delaware, or in his particular case, there has been an abuse of prosecutorial discretion in seeking the death penalty. In examining claims of prosecutorial abuse in this area of the law, this Court has recognized a rebuttable presumption that criminal prosecutions, including decisions to seek the death penalty, are undertaken in good faith and in a nondiscriminatory manner. Albury v. State, Del. Supr., 551 A.2d 53, 62 (1988). Dawson has presented no evidence to support his allegation of historical abuse of prosecutorial discretion in Delaware, when deciding whether to seek the death penalty following a first degree murder conviction. With respect to his own case, for the reasons hereinafter stated, the record reflects overwhelming evidence to support the prosecutor's

decision to seek the death penalty for Dawson. Thus, we conclude that Dawson has failed to sustain his burden of persuasion on this issue. Id.

EVIDENTIARY RULINGS DURING PENALTY HEARING

Following Dawson's convictions, the State represented that, during the penalty hearing, it intended to introduce: (1) expert testimony about the origin and nature of the Aryan Brotherhood, (2) testimony that Dawson referred to himself as Abaddon, had the name "Abaddon" tattooed in red ink across his stomach and that the name means "one of Satan's disciples" or "angel of the bottomless pit,"[24] (3) photographs of Dawson's body depicting his tattoos, and (4) a picture of the swastika that Dawson painted on the wall of his prison cell. Dawson's counsel renewed the objections originally raised, in part, by the motion in limine. The defense argued that none of the evidence proffered by the State should be admitted during the penalty phase because it was inflammatory and irrele-

---

[24]During the guilt phase of Dawson's trial, the Superior Court was not required to rule upon the admissibility of evidence relating to the Aryan Brotherhood, or the swastikas because the State did not seek to introduce such evidence. However, the Superior Court was called upon to address the admissibility of the name "Abaddon" and its meaning, when the State sought to introduce the postcard found in the Kisner automobile that had been signed "Abaddon." The Superior Court ruled:

> Given the other evidence that is available to link the defendant exclusively to the Kisner vehicle, the [Superior] Court is going to direct that there be no reference during the guilt/innocence phase to the name Abaddon. ...
>
> I will allow, however, reference to the postcard during the State's case in chief and also indication through testimony that it was signed [with] a nickname known to be used by the defendant.

vant. Dawson's counsel also renewed the argument that if the State were allowed to introduce this evidence, Dawson's First Amendment rights of freedom of association and freedom of religion and his right to due process would be violated.

After considering the parties' arguments, on the issue of whether evidence concerning the nature of the Aryan Brotherhood and Dawson's membership in that organization would be relevant during the penalty proceeding, the Superior Court stated:

> Well, I will narrow the issues to some extent. [I] find that membership or the act of joining an organization of any particular kind, whether it be the Aryan Brotherhood or the Boy Scouts of America can be probative of character, at least to some extent. The real issue before the Court is whether the probative value is outweighed by the danger of unfair prejudice. So let's focus the argument that way.

Immediately after this preliminary ruling, all of the attorneys requested a recess. Following the recess, the parties executed a stipulation describing the Aryan Brotherhood, and the State agreed not to call an expert witness to explain the origin and nature of that organization. The stipulation, which was received as evidence without further objection, read:

> The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.

In addition to admitting the stipulation into evidence during the penalty hearing, the State called Detective Joseph Huttie ("Huttie") to testify, with the aid of a photograph, that Dawson's right hand bore a tattoo with the name Aryan Brotherhood printed above and below a black and red diamond shaped symbol.

In this appeal, Dawson's counsel argues that no evidence concerning the Aryan Brotherhood should have been admitted during the penalty hearing. According to Dawson's counsel, after the Superior Court's adverse preliminary decision that evidence concerning the Aryan Brotherhood would be relevant to Dawson's character, counsel was "forced" to enter the stipulation in order to guarantee that a relatively "sterile" description of the Aryan Brotherhood would be presented to the jury. Dawson's counsel submits that the stipulation simply characterized that organization and that the objection to the admissibility of any evidence about the Aryan Brotherhood was never withdrawn.

Over objections by Dawson's counsel, the Superior Court also ruled that the State would be permitted to introduce evidence of Dawson's use of the nickname Abaddon and what that name means during the penalty hearing. Huttie testified that, when Dawson was arrested, a photograph was taken showing the name Abaddon tattooed across Dawson's stomach. Huttie also testified that Webster's dictionary defines Abaddon as "angel of the bottomless pit." Patty Elizabeth Dennis ("Dennis") also testified concerning the name Abaddon during the penalty hearing. She stated that while at the Zoo Bar on the night of December 1, 1986, Dawson introduced himself to her as "Abaddon" and told her that the name meant "one of Satan's disciples."

After an inquiry as to the relevance of the swastika evidence to Dawson's character, the Superior Court ruled that the swastika evidence could not be introduced by the State at the penalty

hearing without leave of the court. Following that determination, the State never sought to introduce any evidence concerning swastikas. Consequently, the question of whether such evidence could have been admitted is not in issue.

In a penalty hearing for a defendant found guilty of murder in the first degree, the sole issue is whether or not the death penalty should be imposed. The jury is called upon to make an individualized determination with respect to the appropriateness of the death penalty, based on the defendant's character and the circumstances of the crime. Zant v. Stephens, 462 U.S. 862, 879 (1983). Admissible evidence includes "matters relating to any mitigating circumstances and to any aggravating circumstances." 11 Del. C. § 4209(c). A jury in a capital case may consider non-statutory aggravating circumstances under the death penalty, and may take into account "all specific circumstances of the crime and the defendant." State v. White, Del. Supr., 395 A.2d 1082, 1089 (1978); Deputy v. State, Del. Supr., 500 A.2d 581 (1985), cert. denied, 480 U.S. 940 (1987). Accordingly, a very wide range of evidence is admissible in a penalty hearing. Flamer v. State, Del. Supr., 490 A.2d 104 (1984), cert. denied, 464 U.S. 865 (1983). In this appeal, Dawson challenges the Superior Court's determination that evidence regarding the Aryan Brotherhood and the name Abaddon would properly be admissible as relevant to his character during the penalty hearing.

During the penalty hearing, the State contended that Madeline Kisner's murder was in keeping with the incorrigible nature of

Dawson's character. The State argued that Dawson's life demonstrated an almost complete rejection of the rules which govern a civilized society. The State sought to prove its contention about Dawson's character in several ways.

The State presented evidence of Dawson's extensive criminal history.[25] That history revealed Dawson's repeated convictions for various crimes, resulting in a lifetime of almost continuous incarceration, beginning with Dawson's confinement as a juvenile at the age of thirteen. The State argued that Dawson's selection of the name Abaddon was - like his career of crime - characteristic of the persona chosen by Dawson. The State argued that Dawson's decision to join a prison gang, while he was incarcerated as an adult, was -like his escapes - characteristic of his lawless nature and his denouncement of rehabilitation while incarcerated.

The Superior Court ruled that Dawson's use of the nickname Abaddon was relevant to his character. The record supports that decision. Dawson identified himself as Abaddon. Dawson signed a postcard with that name. He had that name tattooed across his stomach. Dawson introduced himself to Dennis as Abaddon, and explained his understanding of that name to her. What Dawson thought the name Abaddon meant and how it is commonly understood by

---

[25]This history included Dawson's commitment to a juvenile correctional facility at age thirteen, five commitments or recommitments to the Division of Juvenile Corrections dating from October 1968, the determination that he was not amenable to the Family Court processes, fourteen prior felony convictions, three escapes from maximum security juvenile institutions, three adult escapes, and twenty-four conduct violations resulting in sanctions against him as an inmate.

others was relevant to his character because it was a reflection of how Dawson viewed himself and how he wanted to be viewed, even within hours after Madeline Kisner's murder.[26] Cf. Commonwealth v. Abu-Jamal, Pa. Supr., 555 A.2d 846, 859 (1989).

The Superior Court ruled that evidence of Dawson's membership in the Aryan Brotherhood, as well as the nature and the origin of that group, was relevant to Dawson's character. The record also supports that decision. Dawson identified himself as a member of the prison gang known as the Aryan Brotherhood by having its name and logo tattooed on his body. Dawson's affiliation with this type of organization was not only indicative of how he identified himself and how he wanted to be identified by others, but again was characteristic of his lawless nature and rejection of rehabilitation during his incarceration. See United States v. Abel, 469 U.S. 45 (1984).

Dawson argues that even if the evidence about the Aryan Brotherhood and the name Abaddon were relevant to his character, the use of that evidence against him during the penalty proceeding violated his rights of free speech and association. U.S. Const. amend. I; Del. Const. art. I, §§ 5 and 16. See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969); Elfbrandt v. Russell, 384 U.S. 11 (1966); Aptheker v. Secretary of State, 37 U.S. 500 (1964); Noto v.

[26]Huttie was permitted to testify that Webster's Dictionary defined Abaddon as the "angel of the bottomless pit." This definition has a biblical origin. See Revelations 9:11 (King James). Dennis testified that Dawson told her Abaddon meant "one of Satan's disciples." Dawson's understanding of the meaning of his nickname is therefore consistent with its commonly accepted meaning.

United States, 367 U.S. 290 (1961); Scales v. United States, 367 U.S. 203 (1961). Additionally, Dawson argues that by improperly injecting race and religion into his trial, his constitutional right to due process was violated. Baldwin v. Alabama, 472 U.S. 372 (1985); Weddington v. State, Del. Supr., 545 A.2d 607, 615 (1988); Brokenbrough v. State, Del. Supr., 522 A.2d 851 (1987). The State denies that it presented any issue of race, religion or political affiliation to the jury in violation of Dawson's rights.

During the penalty phase of Dawson's trial, the jury had to decide whether Dawson should be executed or imprisoned for the rest of his life. Before recommending a death sentence, it was mandatory for the jury to find that the State had proven the existence of at least one statutory aggravating factor. In Dawson's case, the jury found that the State had proven three statutory aggravating factors.[27] The jury was also required to make an individualized determination of whether Dawson should be executed or incarcerated for life, based upon Dawson's character, his record and the circumstances of the crime. Booth v. Maryland, 482 U.S. 496 (1987) (emphasis in original) (citations omitted);

[27]The three statutory aggravating circumstances which the jury found to exist in Dawson's case were:

1. The murder was committed by a person who had escaped from a place of confinement.

2. The murder was committed while the defendant was engaged in the commission of burglary and/or robbery.

3. The murder was committed for pecuniary gain.

11 Del. C. § 4209(e)(a), (j) and (o).

Zant v. Stephens, 462 U.S. at 879; Blystone v. Pennsylvania, 110 S.Ct. 1078, 1083 (1990); Penry v. Lynaugh, 109 S.Ct. 2934 (1989); State v. White, Del. Supr., 395 A.2d 1082 (1978).

Because of the duty to be performed during a penalty hearing, "it is desirable for the jury to have as much information before it as possible when it makes the sentencing decision." Gregg v. Georgia, 428 U.S. 153, 204 (1976). Nevertheless, "a death sentence based upon consideration of 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant' would violate the Constitution." Baldwin v. Alabama, 472 U.S. 372, 382 (1985) (quoting Zant v. Stevens, 462 U.S. at 885). However, "[p]unishing a person for expressing his views or for associating with certain people is substantially different from allowing ... evidence of [the defendant's] character [to be considered] where that character is a relevant inquiry." Commonwealth v. Abu-Jamal, 555 A.2d at 859. Dawson's character was relevant to the jury's determination of whether he should be executed.

> Lockett and Eddings reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion.

California v. Brown, 107 S.Ct. 837, 841 (1987).

During the penalty hearing, the evidence the State presented to the jury regarding the Aryan Brotherhood and the name Abaddon

properly focused the jury's attention on Dawson's character.[28] The State did not offer that evidence in order to improperly appeal to the jurors' passions and prejudices concerning race, religion, or political affiliation. Cf. United States v. Abel, 469 U.S. 45 (1984); Weddington v. State, Del. Supr., 545 A.2d 607 (1988); Brokenbrough v. State, Del. Supr., 522 A.2d 851 (1987); Hooks v. State, Del. Supr., 416 A.2d 189 (1980). The State's evidence, briefly defining the Aryan Brotherhood and the name Abaddon, was presented in a manner which did not shift the jury's attention away from the issue of Dawson's character. Booth v. Maryland, 482 U.S. 496 (1987). The context of the State's evidence was necessary to explain Dawson's view of himself and how he wanted to be viewed by others.[29] Id.

---

[28]The State did not contend that Dawson's membership in the Aryan Brotherhood or use of the name Abaddon provided the motivation for the murder. Compare Barclay v. Florida, 463 U.S. 939, 948 (1983). See also United States v. Mills, 704 F.2d 1553, 1559 (11th Cir. 1983).

[29]In his closing argument during the penalty hearing, the prosecutor stated:

> Dawson has taken the name Abaddon. We didn't tell you that because necessarily, or even for any religious reason, but it tells you something about what Abaddon means: The angel of the bottomless pit, one of Satan's disciples. What does that say about how he views himself, how he would like to be seen by other people? What purpose could there be in calling himself the angel of the bottomless pit, Abaddon, other than to tell people you better watch out for me. I am bad.
>
> This is not just a passing fancy, a fad, a phase in his life. It is a direction his life has turned. It is not just a nickname he goes by. He has marred his body with that tattoo: Abaddon. He is serious about this, ladies and gentlemen. All the way across his stomach

(continued...)

We hold that the evidence relating to the Aryan Brotherhood and the name Abaddon was properly considered by the jury during the penalty hearing. That evidence was relevant to Dawson's character. Its admission did not violate Dawson's constitutional rights. Booth v. Maryland, 482 U.S. 496 (1987); Baldwin v. Alabama, 472 U.S. 372 (1985); United States v. Abel, 469 U.S. 45 (1984); Zant v. Stevens, 462 U.S. 862 (1983); State v. White, Del. Supr., 395 A.2d 1082 (1978).

DEATH PENALTY INSTRUCTIONS

Dawson's next argument relates to the trial judge's comments to the jury at the inception of the penalty hearing. As part of his introductory remarks, the trial judge stated:

> Members of the jury, the Delaware Criminal Code provides that upon conviction of a defendant of murder in the first degree the Superior Court shall conduct a separate hearing to determine whether the defendant shall be sentenced to death or to life imprisonment without benefit of probation or parole or without any other reduction of sentence. It is your function as the jury in this case to determine if the defendant will be sentenced to death or to life imprisonment without benefit of probation or parole or any other reduction.
>
> The law does not require you under any circumstances to recommend a sentence of death. Instead, you may in your discretion and regardless of circumstances recommend imposition of the death penalty. You are required, however, to consider a sentence of death as a possible punishment in this case. I will give you detailed instructions on the applicable law at the conclusion of the evidence. (emphasis added).

Both parties agree that what the trial judge should have said, and

---

[29](...continued)
A B A D D O N in block letters that high (indicating). He relishes that connotation, that impression of evil: The angel of the bottomless pit.

apparently meant to say, was that "regardless of the circumstances, the jury could recommend against the imposition of death penalty."

The defense did not raise an objection to this comment at any time during the penalty hearing. Nevertheless, Dawson now argues that the trial court's introductory remarks at the penalty hearing "invited and authorized unbridled jury discretion in the penalty determination process of a capital murder case and constituted a clear violation of [his] rights under the eighth and fourteenth amendments." Furman v. Georgia, 408 U.S. 238 (1972); State v. Dickerson, Del. Supr., 298 A.2d 761, 764 (1972). This Court will generally decline to review contentions which were not fairly presented to the trial court for decision. Supr. Ct. R. 8.

However, this Court will review an issue not raised at trial if it constitutes plain error. Supr. Ct. R. 8; Goddard v. State, Del. Supr., 382 A.2d 238, 242 (1977).

> Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process. Furthermore, the doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.

Wainwright v. State, Del. Supr., 504 A.2d 1096, 1100 (1986) (citations omitted). In reviewing Dawson's present claim of plain error, we must determine whether the trial judge's preliminary comments were erroneous as a matter of law and, if so, whether that error so affected Dawson's substantial rights that it jeopardized the fairness and integrity of the penalty hearing. Id.

As a general rule, a defendant in a criminal proceeding is not entitled to a particular form of jury instruction, but he does have the unqualified right to a correct statement of the substance of the law. Flamer v. State, 490 A.2d at 128. "When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process." Walton v. Arizona, 58 LW 4992, 4995 (1990). Clearly, the trial judge misspoke when he initially told the jury that it could recommend the death sentence for Dawson, regardless of the circumstances. Since the jury did, in fact, recommend the imposition of the death penalty, we must examine the effect of the trial judge's erroneous remark.

In undertaking this evaluation, we are guided by the well-established rule "that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Boyde v. California, 110 S.Ct. 1190, 1196 (1990) (quoting Cupp v. Naughten, 414 U.S. 141 (1973)); Probst v. State, Del. Supr., 547 A.2d 114, 119 (1988). Jury instructions do not need to be perfect. Whalen v. State, Del. Supr., 492 A.2d 552, 559 (1985). "Some inaccuracies and inaptness in statement are to be expected." Flamer v. State, 490 A.2d at 128 (citing Baker v. Reid, Del. Supr., 57 A.2d 103, 109 (1947)). "A trial court's jury charge will not serve as grounds for reversible error if it is 'reasonably informative and not misleading, judged by common practices and standards of verbal communication.'" Id. The proper focus of our inquiry in Dawson's case is whether there is a

reasonable likelihood that the trial court's initial misstatement undermined the ability of the jury to accurately perform its duty in returning a sentence recommendation. Boyde v. California, 110 S.Ct. at 1198; Flamer v. State, 490 A.2d at 128. See also Whalen v. State, 492 A.2d at 559.

"Obviously, instructions play a critical role in the penalty phase of a capital case." Whalen v. State, 492 A.2d at 559. This Court and the United States Supreme Court have held that the sentencing procedures in capital cases must not create "a substantial risk that the [death penalty will] be inflicted in an arbitrary and capricious manner." Id. (citing Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion)). Although discretion in sentencing may not be eliminated completely, it must be "directed and limited". Id. See also, Franklin v. Lynaugh, 108 S.Ct. 2320, 2331 (1988). "Thus, it is the trial judge's duty to guide the jury's discretion by ensuring that they understand the bases for imposing a death sentence, and comprehend their responsibilities in applying such criteria. It is only through the careful use of jury instructions that the judge properly discharges this function." Whalen v. State, 492 A.2d at 559.

Under Delaware law, a separate penalty hearing is conducted to determine whether a defendant, who has been found guilty of Murder in the First Degree, will be sentenced to death or life imprisonment without probation or parole. 11 Del. C. § 4209(b)(1). Whalen v. State, 492 A.2d at 559-60. Before recommending the imposition of a death sentence, the jury must engage in a two-step analysis.

Id. First, it must make an initial finding of the existence of at least one statutory aggravating circumstance. Id. Second, it must weigh the aggravating circumstances against any mitigating circumstances found to exist. Unless the jury unanimously concludes that the aggravating circumstances outweigh the mitigating circumstances, the death penalty cannot be imposed. Id. The trial court's instructions to the jury must clearly convey that this two-part analysis still permits the jury to recommend against the death penalty no matter what aggravating circumstances are found to exist. Id.

In Dawson's case, the trial judge's misstatement was not made during his formal instructions to the jury. Rather, it occurred during his brief preliminary comments, intended to orient the jury, at the outset of the penalty hearing. Even so, during these prefatory remarks, the trial judge accurately told the jury that the penalty hearing was being conducted "to determine whether the defendant shall be sentenced to death or to life imprisonment." At the same time the trial judge accurately stated to the jury that "the law does not require you under any circumstances to recommend a sentence of death." The trial judge ended his introductory remarks by telling the jury that he would give them "detailed instructions on the applicable law at the conclusion of the evidence" presented during the penalty hearing.

The sentencing decision was not ultimately submitted to the jury in Dawson's case on an impermissible legal theory. Cf. Stromberg v. California, 283 U.S. 359 (1931). Following the

attorneys' closing arguments, the trial judge gave specific instructions concerning the law to be applied by the jury during the penalty phase. The jurors were properly advised that they could not impose a sentence of death unless they found beyond a reasonable doubt at least one statutory aggravating circumstance and unanimously recommended a sentence of death, after weighing all relevant evidence in aggravation and mitigation of the crime, and the particular characteristics and propensities of the defendant. During these formal instructions, the trial judge correctly instructed the jury that "regardless of the circumstances, they could recommend against the death penalty."[30] In addition, six

---

[30]During the penalty proceeding, following the closing arguments, the Superior Court instructed the jury in part, as follows:

> I shall now instruct you as to the applicable principles of law governing the punishment to be imposed in this case. No single one of these instructions states all of the law applicable to this determination. Therefore, you must listen to and consider all of these instructions together. You are to apply the law to the facts and in this way decide the punishment to be imposed in this case. ...
>
> It is your function as the jury in this case to determine if the defendant will be sentenced to death or to life imprisonment without benefit of probation or parole or any other reduction. The law does not require you under any circumstances to recommend a sentence of death. Instead, you may, in your discretion and regardless of the circumstances, recommend against imposition of the death penalty. You are required, however, to consider a sentence of death as a possible punishment in this case.
>
> The applicable portion of Delaware law provides: Any person who is convicted of first degree murder shall be punished by death or by imprisonment for the remainder of his or her natural life without benefit of probation

(continued...)

copies of those written instructions, which accurately set forth

---

[30](...continued)
or parole or any other reduction, said penalty to be determined in accordance with this section. ...

A sentence of death should not be imposed unless the jury finds:

1. Beyond a reasonable doubt at least one statutory aggravating circumstance; and

2. Unanimously recommends, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that a sentence of death be imposed. Where the jury submits such a finding and recommendation, the Court shall sentence the defendant to death. ...

If you have a reasonable doubt about the existence of a statutory aggravating circumstance, you must give the defendant the benefit of that reasonable doubt and find that such statutory aggravating circumstance does not exist. ...

If you do unanimously find beyond a reasonable doubt that one or more statutory aggravating circumstances exist, you must then weight and consider the mitigating circumstances and the aggravating circumstances including, but not limited to, the statutory aggravating circumstance or circumstances that you have already found to exist.

You must weigh all relevant evidence in aggravation and mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender.

In weighing the aggravating and mitigating circumstances, it is not a question of mere numbers of each, but rather the relative weight of each as compared to the other. In order to recommend a sentence of death, you must unanimously find that the aggravating factors outweigh the mitigating factors. Regardless of the circumstances, you in your discretion may recommend that a sentence of life imprisonment without probation or parole be imposed.

the law, were provided to the jury.[31]

After reviewing the jury instructions in their entirety, we find that the trial judge's misstatement during his preliminary remarks was not prejudicial to any of Dawson's substantial rights and did not jeopardize the fairness or the integrity of the penalty hearing. California v. Brown, 107 S.Ct. 837, 839-40 (1987). The trial court's actual instructions to the jury accurately, and on more than one occasion, advised the jury that it retained the option to recommend against the death penalty for Dawson, despite any aggravating factors it found to exist. Flamer v. State, 490 A.2d at 128. Cf. Whalen v. State, 492 A.2d at 559-60. We conclude that the trial court's erroneous introductory statement to the contrary was harmless beyond a reasonable doubt. Id. We find no reasonable likelihood that the trial court's misstatement at the commencement of the penalty hearing caused the Dawson jurors to misinterpret the actual and accurate instructions, which were subsequently given to them orally and in writing. Boyde v. California, 110 S.Ct. 1190, 1197-98 (1990); Flamer v. State, 490 A.2d at 128.

DEATH PENALTY REVIEW

Finally, we undertake our statutory obligation to review the

---

[31] Members of the jury, you will have with you in the jury room all of the exhibits which have been introduced in the case and I will also be providing you with six copies of this instruction which I have just read along with the interrogatories for you to sign and a copy of the indictment Counts 3 through 15 for your reference.

imposition of the death penalty in this case. See Riley v. State, 496 A.2d at 1026; Flamer v. State, 490 A.2d at 137-45. 11 Del. C. § 4209(g)(2) provides as follows:

> The Supreme Court shall limit its review under this section to the recommendation on an imposition of the penalty of death and shall determine:
>
> a. Whether, considering the totality of evidence in aggravation and mitigation which bears upon the particular circumstances or details of the offense and the character and propensities of the offender, the death penalty was either arbitrarily or capriciously imposed or recommended, or disproportionate to the penalty recommended or imposed in similar cases arising under this section.
>
> b. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection (e) of this section and, where applicable, § 636(a)(2)-(7) of this title.

In performing our review, in accordance with the statute, we are cognizant that "death as a punishment is unique in its severity and irrevocability." Furman v. Georgia, 408 U.S. 238 (1972).

Addressing subparagraph b of Section 4209(g)(2) first, the Dawson jury found the existence of three statutory aggravating circumstances. The first statutory aggravating circumstance found by the jury was that the murder was committed by a person who had escaped from a place of confinement. During the penalty hearing, the Superior Court quite properly instructed the jury that this statutory aggravating circumstance had been established beyond a reasonable doubt, as a matter of law, by virtue of Dawson's convictions at trial. Dawson had been convicted of violating 11 Del. C. § 636(a)(7) as charged in Count 13, 11 Del. C. § 636(a)(6)

as charged in Count 11, and 11 Del. C. § 636(a)(2) as charged in Count 9.[32] The second statutory aggravating circumstance was that the killing occurred during the commission of a burglary and/or robbery. The Superior Court also properly instructed the jury that Dawson's felony murder conviction had established this statutory aggravating circumstance, as a matter of law. See Deputy v. State, Del. Supr., 500 A.2d 581, 602 (1985), cert. denied, 480 U.S. 940 (1987). The third statutory aggravating circumstance was that the murder was committed for pecuniary gain. This issue was submitted to the jury. The jury unanimously found that it had been established beyond a reasonable doubt. We conclude that the evidence in

---

[32]These respective sections of the Delaware Code provide in pertinent part that:

> 11 Del. C. § 636(a)(7):
>
> A person is guilty of Murder in the First Degree when he causes the death of another person ... in the course of and in furtherance of the commission ... of escape ... after conviction.
>
> 11 Del. C. § 636(a)(6):
>
> A person is guilty of Murder in the First Degree when he, with criminal negligence, causes the death of another person in the course of and in furtherance of the commission or attempted commission of rape, kidnapping, arson in the first degree, robbery in the first degree, burglary in the first degree, or immediate flight therefrom.
>
> 11 Del. C. § 636(a)(2):
>
> A person is guilty of Murder in the First Degree when, in the course of and in furtherance of the commission or attempted commission of a felony or immediate flight therefrom, he recklessly causes the death of another person.

the record supports the jury's findings that three of the statutory aggravating circumstances enumerated under Section 4209(e) had been established beyond a reasonable doubt in Dawson's case.

Two additional inquiries are required by subparagraph a of Section 4209(g)(2): first, whether the jury's imposition of the death penalty was either arbitrary or capricious, and second, whether the death penalty imposed was disproportionate to the penalty imposed in similar cases arising under the statute. Riley v. State, Del. Supr., 496 A.2d 997, 1026 (1985). "Each question requires a consideration of the totality of evidence in aggravation and mitigation which bears upon the particular circumstances or details of the offense and the character and propensities of the offender." Id.; 11 Del. C. § 4209(g)(2).

The State's evidence with respect to the statutory aggravating circumstances established that the murder was committed by a person who had escaped from a place of confinement, the murder was committed while Dawson was engaged in the commission of burglary, and the murder was committed for pecuniary gain. The non-statutory aggravating circumstances upon which the State relied were Dawson's prior criminal record, his character and his propensities. In mitigation, Dawson offered evidence from two family members, his sister and an aunt, who testified that they loved him and that Dawson had once offered to donate a kidney to his cousin. After a careful review of the entire record, we find that the sentence of death was neither arbitrarily nor capriciously imposed by the jury. The record reflects that the weight of the statutory and non-

statutory aggravating circumstances completely overwhelmed the mitigating circumstances.

The remaining question which we now address, is whether the jury's recommendation that the death penalty be imposed in Dawson's case was disproportionate to the penalty recommended in similar cases arising under our statute. We have done so by reviewing the "universe" of cases established in Flamer, Riley, and DeShields, as well as all of the subsequent cases falling therein, i.e., we have compared Dawson's sentence with the penalties in all first degree murder cases which have gone to trial and a penalty hearing. Riley v. State, 496 A.2d at 1027-28; Flamer v. State, 490 A.2d at 140; (Appendix I). We have also considered objective factors such as the gravity of the offense, the circumstances of the defendant's crime, and the harshness of the penalty. See Solem v. Helm, 463 U.S. 277, 290-92 (1983).

A definitive comparison of cases is almost impossible. Riley v. State, 496 A.2d at 1027; Flamer v. State, 490 A.2d at 144.

> "Individual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.' The capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant. It is not surprising that such collective judgments often are difficult to explain. But the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.'"

McCleskey v. Kemp, 107 S.Ct. at 1776, 1777.

We have reviewed the factual background of the applicable

"universe" of cases. Dawson, like the other defendants sentenced to death in Delaware, was found guilty of committing an unprovoked, cold-blooded murder of a person who lacked the ability to defend herself, solely for pecuniary gain. Riley v. State, 496 A.2d at 1027. Dawson, like Billie Bailey, committed the murder while he was an escapee from a correctional institution. Bailey v. State, Del. Supr., 503 A.2d 1210 (1984). Moreover, the record in Dawson's case reflects the existence of not one, but three statutory aggravating circumstances, significant non-statutory aggravating circumstances and virtually no evidence of mitigation. We find that the death sentences imposed upon Dawson are not comparatively disproportionate to the sentences in the other first degree murder cases that have proceeded to a penalty hearing pursuant to the Delaware statute, and in which at least one statutory aggravating circumstance was found to exist by the jury. See Deputy v. State, 500 A.2d at 602.

CONCLUSION

The judgments of the Superior Court, which resulted in Dawson's convictions and sentences, including the imposition of the death sentences, are AFFIRMED.

APPENDIX I

FIRST DEGREE MURDER CASES THAT WENT TO PENALTY HEARINGS SINCE 1985

Case Name:	William P. Baynard
Case No.:	S84-050137, 0141
County:	New Castle
Sentence:	Life Imprisonment
Case Name:	Randsford Bryan
Case No.:	S87-11-0063
County:	Sussex
Sentence:	Life Imprisonment
Case Name:	Vicky Chao
Case No.:	IN88-031025 - 1025 & 1027, 1028 IN88-0832 - 0836
County:	New Castle
Sentence:	Life Imprisonment
Case Name:	Carmelo J. Claudio
Case No.:	IN87-030067 - 68
County:	New Castle
Sentence:	Life Imprisonment
Case Name:	Lawrence R. Collingwood, Jr.
Case No.	K87-09-0895 - 0901
County:	Kent
Sentence:	Life Imprisonment
Case Name:	David F. Dawson
Case No.:	IK87-010834 through 0847
County:	Kent
Sentence:	Death
Case Name:	Kenneth W. DeShields
Case No.:	IS84-080075 - 1075, -1275, -2075
County:	Sussex
Sentence:	Death
Case Name:	James M. Elliotte
Case No.:	IN81-110834 & 0835
County:	New Castle
Sentence:	Life Imprisonment
Case Name:	Edward A. Fountain, Jr.
Case No.:	IN84-120293 thru 0297 IN84-121795 thru 1797
County:	New Castle
Sentence:	Life Imprisonment

Case Name: Randolph Graham
Case No.: IK86-010059
County: Kent
Sentence: Life Imprisonment

Case Name: Charles K. Kelly
Case No.: IN85-10-1671, 1672, 1673
County: New Castle
Sentence: Life Imprisonment

Case Name: Joyce L. Lynch
Case No.: IK88-010040
County: Kent
Sentence: Life Imprisonment

Case Name: Stanley Newell
Case No.: IN89-006109
County: New Castle
Sentence: Life Imprisonment

Case Name: Ernest Charles Parson, Jr.
Case No.: IN86-120380, 86-11136 - 1137
IN86-1144, 1147, 0381 - 0383, 1135
County: New Castle
Sentence: Life Imprisonment

Case Name: Steven B. Pennell
Case No.: IN88-120051 - 0053
County: New Castle
Sentence: Life Imprisonment

Case Name: Vincent Perry
Case No.: IN85-101668 - 1673
County: New Castle
Sentence: Life Imprisonment

Case Name: Maurice Polk
Case No.: S87-12-0093
County: Sussex
Sentence: Life Imprisonment

Case Name: Frederick James Roop
Case No.: IN84-101691, 1692
County: New Castle
Sentence: Life Imprisonment

Case Name: Reginald N. Sanders
Case No.: IK86-030898 through 0903
County: Kent
Sentence: Death

Case Name: Christie C. Shipley
Case No.: IK85-020820 and 0821
County: Kent
Sentence: Life Imprisonment

Case Name: Melvin Smart
Case No.: S84-08-0037 and S84-08-0038
County: Sussex
Sentence: Life Imprisonment

Case Name: Desi Sykes
Case No.: IK88-11005
County: Kent
Sentence: Life Imprisonment

Case Name: Richard C. Thompson
Case No.: IK86-010059
County: Kent
Sentence: Life Imprisonment

Case Name: Suzanne M. Triano
Case No.: IN84-051701
County: New Castle
Sentence: Life Imprisonment

Case Name: Frank C. Whalen, Jr.
Case No.: IK77090035, 0036; IK78-030029
County: New Castle (venue changed)
Sentence: Life Imprisonment

Case Name: Lonnie Williams
Case No.: IN89-08-0638 through 0645
IN89-09-0938 through 0943
County: New Castle
Sentence: Life Imprisonment

MR. SWIERZBINSKI: Your Honor, I appreciate Mr. Butler's comment about the potential extra voir dire questioning and he and I conferred at length on Friday about this area and he did mention that. I would like to have a chance to consult with Mr. Otlowski about that for a few minutes before we start proceeding.

But our position goes a little deeper than a voir dire question. Our position is we requested Your Honor, I think by letter of May 25 -- and we discussed it at length last Thursday -- to rule on our motion in limine to exclude such testimony from the proceeding.

I think Mr. Butler and I had arrived at an understanding on Friday, and Charlie could correct me if I am wrong, but the State will not introduce anything about the Aryan Brotherhood on trial and I think their only concern was that I might intentionally bring something like that on cross-examination. I indicated to him I certainly don't intend to get into that on trial. I think we agree on that.

MR. BUTLER: Essentially.

MR. SWIERZBINSKI: I think what it boils down to is whether or not this would come in on the penalty hearing. Our position once again as I tried to state last Thursday was that such evidence is clearly, number one, not

only is it inflammatory, it is also in violation of the First Amendment. Because what --

THE COURT: I understand your argument. It is not necessary to repeat it.

MR. SWIERZBINSKI: I am saying what he believes is not necessarily what he does. If the State could produce certain evidence that he did something, that would be fine. I do not think it is an unreasonable request to have the State give us an offer of proof.

If I understand Mr. Wharton correctly at this point, he doesn't know what he would do in a penalty hearing. We are starting trial in an hour or so. At this point they should have a fairly good idea on what they are going to do. If they don't know what they are going to do basically they are just going to be introducing it for the sake of religious or racial prejudice.

I need to know when Your Honor is going to rule so I know what I can do in terms of picking a jury. I would like to have blacks and Jews sitting on the jury because if sociologists are in any way correct they are the people who are the most compassionate and most understanding, and the people that would tend to give David Dawson a break on the issue of guilt or innocence.

At the same time they are the same people -- if sociologist are correct -- are the people who would be against the death penalty if we get to a penalty hearing.

I don't want to strike those people who probably would be some of our best jurors, but I can't let them sit if they are going to be influenced racially by someone or by evidence that this defendant hates blacks and he hates Jews. That is my dilemma.

I would respectfully suggest case law clearly says a penalty hearing is not a no holds barred hearing. There are certain guidelines that can be overstepped. I would suggest that if the Court permits that to be introduced as entering a number of arbitrary and capricious factor which is not envisioned in the death penalty statute.

Basically, as I said, I don't want to strike blacks and Jews from the jury just because of that. I think the Court would be forcing me to do that if the Court permits the racially and religiously prejudicial evidence to come in. I am just trying to make a record clear.

I also want the record clear, if this is ever reviewed, I am personally not prejudiced against blacks or Jews. I have friends who are black. I have friends who

are Jews. They have been in my house and I have been to their homes. I don't bear any prejudice against either race.

In terms of representing this man, I have a real problem having blacks and Jews on the jury if the State is going to introduce prejudicial evidence because it is racial or religious.

THE COURT: If we reach a penalty phase, is there going to be testimony from the defense relating to model prisoner status at the Delaware Correctional Center?

MR. SWIERZBINSKI: No, sir. We will put on witnesses, but I am not going to have anyone say David Dawson is a model prisoner.

THE COURT: You agree that membership in a prison gang would then become relevant at that stage?

MR. SWIERZBINSKI: It all depends what Your Honor's definition of prison gang is. I mean, if Your Honor is saying --

THE COURT: Aryan Brotherhood.

MR. SWIERZBINSKI: I would respectfully suggest that if that is introduced and it's going to be introduced solely for the basis of racial and religious prejudice that Your Honor has the authority to keep it out

because the prejudice so grossly outweighs any relevance that it might have, when Your Honor balances what comes in and the harm is done it is clearly showing there is prejudice.

MR. WHARTON: Your Honor, we can't anticipate with certainty what evidence, if any, the defendant will attempt to put on in a penalty hearing. I think that is why it's difficult to rule or to make a determination in a vacuum until we see how things shape up. Until we see how things shape up, I think Mr. Swierzbinski must make his best judgement -- concedingly a difficult decision -- but he must make his best judgement about what type of voir dire questions he wants to ask the jury and what type of people he wants on a jury.

This affiliation with this group is not something the State can concoct but it's part of his client's makeup, part of character and part of his propensities. I think to the extent he is in a difficult situation is because of what the defendant has done with his life and we are saying, the State is saying to the defense go ahead and phrase your voir dire questions how you choose and exercise your peremptory challenges as you choose, but keep in mind the State intends to or considers this membership part of the defendant's character and propensities.

THE COURT: All right. I will grant the defendant's request to ask the question: What is your religious preference if any?

Anything else?

MR. SWIERZBINSKI: Your Honor has still never ruled on our request of the motion in limine. Do I take it Your Honor is saying if we get to a penalty hearing everything about the Aryan Brotherhood can come in? Is that what Your Honor is saying?

THE COURT: No. What I am saying is what I have already said. The State is prohibited from introducing any evidence or evidence relating to the Aryan Brotherhood without leave of the Court. I will judge its probative value and any defense balancing as necessary under Rule 403 in the context of what proceedings are at the time in which the evidence is offered.

MR. SWIERZBINSKI: Can I talk to Mr. Otlowski outside for a few minutes concerning the State's offer for an extra question or questions in that area?

THE COURT: You may.

MR. SWIERZBINSKI: Thank you, Your Honor.

(Pause.)

THE COURT: Mr. Swierzbinski.

record.)

THE COURT: This Court is now in recess to the call of the court.

(Whereupon, an in-chambers conferences was held as follows.)

THE COURT: First, regarding the penalty hearing to be held on Monday. What, Mr. Wharton, are the statutory aggravating circumstances that the State would be relying on?

MR. WHARTON: Your Honor, we advised defense counsel by letter, I think, dated February 29th of this year, that we would be relying on Subsection A, which is --

THE COURT: Here you are.

MR. WHARTON: That it was committed by an escapee, 4209(1)(a). The murder was committed by a person in, or who has escaped from the custody of law enforcement officer or place of confinement. The murder was committed while the defendant was engaged during the commission or attempted of or flight of a commission or attempting -- this would be robbery or burglary as applies to this case. Oh, the murder was committed for pecuniary gain.

THE COURT: Mr. Swierzbinski, I understand you have an application in limine regarding the evidence which you are concerned that the State may offer.

MR. SWIERZBINSKI: Yes, Your Honor. We spoke in the law library while we were waiting for Your Honor. Mr. Butler pretty much outlined what the State was intending to do.

THE COURT: Well, let me hear Mr. Butler outline it. I will have it first-hand.

MR. BUTLER: Your Honor, when I spoke to Mr. Swierzbinski, I did advise him that I have to advise the Court and Mr. Swierzbinski, based upon a somewhat sketchy outline that I have from a gentleman by the name of Gary Aaron -- Mr. Aaron is employed by the Federal Prison System. Specifically, the Correctional Services Branch and his particular area of expertise, I suppose, one would call it is in disruptive groups. That is what the Federal Prison System calls them.

In his specific duty he is in charge of monitoring all disruptive groups within the Federal Prison System. Mr. Aaron's specialty, obviously, is prison gangs and he has developed that expertise over -- quite frankly, I don't have a copy of his curriculum vitae or his resume, so I can't give the Court specifics. So I can suggest that I believe he worked within the State system in California and has also worked as a liaison in the State system of Texas.

My problem is I don't know if he was a Federal employee at the time or whether he was employed by those State

systems directly. But, once again, when this goes back to the early '70's, his job was acting as a liasion.

He also has been an instructor, instructing prison authorities; both federally and within State institutions, on identifying members of disruptive groups, as well as the particular functions, roles, goals and so forth of disruptive groups, generally and specifically.

He is familiar with the Aryan Brotherhood and he is familiar with them generally in California; with their reasons for their initial appearance in California. He is familiar with their penetration, if you will, into other institutions. He is familiar with the national goals of the Aryan Brotherhood, and I state specifically two goals that he ascribes to the Aryan Brotherhood; the control of drugs within the prison institutions, and they are also associated with the violent attempt escapes, escape attempts.

He, also in order to be complete with respect to his testimony, he is familiar with the national norms, if you will, for the Aryan Brotherhood. That is to say that he can tell us what Aryan Brotherhoods generally ascribe to, what their goals are, what their orientation is.

He has expertise with respect to specific State adaptations, if you will, of those national goals. For example,

he will tell us that Texas Aryan Brothers do not recognize Arizona Aryan Brothers and vice versa and members of the Aryan Brotherhood in the State system don't necessarily recognize Aryan Brothers within the federal system. That there are cells or specific off-shoots within various local jurisdictions that don't see eye to eye or share a union, if you will.

He can testify about initiation. He can testify about tattoos. He can testify about specific emblems or insignias that are asscciated with the Brotherhoods.

I suppose that is all proffered for the purpose obviously of showing something about what it means to be in the Aryan Brotherhood or what the general tenor of the Aryan Brotherhood is.

He is not familiar with the Delaware off-shoot of the Aryan Brotherhood and our information at this point would indicate that Delaware does not have a resident expert within the prison system available to give testimony as to the specific attributes of the Aryan Brotherhood within the State of Delaware. So that he can help the jury in the sense that he can tell us something about Aryan Brotherhoodism. He can tell us what that is.

He will concede that he is not familiar -- he recognizes obviously there are off-shoots within State insti-

tutions. All of them sharing common attributes. It's those common attributes that the State seeks to introduce in this case while conceding that he does not know what specific attributes might be applicable to a Delaware inmate who is a member of an Aryan Brotherhood.

That is the general proffer of his testimony. Again, I need to speak to him again to get specific answers to specific questions that we would be asking him if his testimony were allowed.

THE COURT: How would this be tied into the defendant David Dawson?

MR. BUTLER: Well, Your Honor, as I said, it wouldn't be tied in in a specific sense. The State can't produce an expert who can tell us that David Dawson holds this particular belief or David Dawson acts upon this particular belief. What we seek to introduce is some understanding of what David Dawson ascribes to himself, the label Aryan Brotherhood, and we will produce ample testimony on that point. That is as to on his hands, the clothing that he wears, correspondence that he keeps and so forth. I think the next question becomes he is an Aryan Brother. While the Court may have some information based on a newspaper article, we may have some information based on magazines or so on. The jury has no idea what that means.

What we feel we need to do is give them some general understanding of what, why would somebody want to be an Aryan Brother. What does that mean, what does that tell us about the character of the defendant. We don't see it as particularly important whether the defendant has, in fact, killed in order to gain access to the Aryan Brotherhood or has, in fact, committed a violent escape in order to get in, or has killed another inmate to get in or so forth. But the fact that he ascribes to that general set of ideals, which the expert can tell us about, and he does ascribe to them by reason of all these tattoos and other evidence that I have suggested to the Court, tells us in itself --

THE COURT: Let me hear the details as to this. You contend he ascribes to those particular ideas by virtue of what, tattoos of what?

MR. BUTLER: Tattoo on his right hand that states Aryan Brotherhood and the two words being separated by an emblem of approximately five swastikas tattooed on his back. I believe there may be an additional swastika tattooed on his arm. The belt that the defendant was wearing had two letters A and B separated by a swastika on the buckle.

THE COURT: This is what he was wearing when?

MR. BUTLER: At the time he was apprehended.

Correspondence has been seized on two different occasions from his cell. There are --

THE COURT: That says what?

MR. BUTLER: Well, one says, for example, greetings my Aryan Brother. There are a lot of, I guess, I would call them doodles, if you will. They are pages with sort of rudimentary art work in the cell with Aryan Brotherhood, Aryan Brotherhood forever, Aryan Brothers live.

There is at least one other letter that was seized shortly -- I think it was in the spring of 1987 wherein the defendant says that Aryan Brothers must take flight. There is literature describing something called Odinism and that, apparently, ties into this. Your Honor, I haven't read the whole thing, but --

MR. WHARTON: It is a little tedious.

MR. BUTLER: It has to do with white supremacy. Maybe Ferris read it. Did you read the whole thing?

MR. WHARTON: I couldn't get through the whole thing. It deals with kinds of white supremacy as religion.

MR. BUTLER: Your Honor, painted in his cell in probably a flag form that has not been seen since the third reich is a tremendously large swatiska painted in red, white and black, and I don't know the answer to your next question, how you are

allowed to do that in a prison cell. I don't know.

THE COURT: It's on the wall?

MR. BUTLER: It's on the wall in his cell. All of these swatiskas and so forth are obviously tied into the Aryan Brotherhood. So that becomes all -- again, the State doesn't see it as particularly necessary for it to show that the defendant has undergone some right of initiation into this group. In fact, the expert would tell us that although this is a well recognized group nationwide, he can only identify positively and without equivocation, 120 full-fledged members have what he calls earned their bones. Earning your bones for the Aryan Brotherhood requires either a murder or an attempted murder of another inmate. That has to be either a rival gang member or a defector from the Aryan Brotherhood.

Again, he would testify that once you are in the Aryan Brotherhood, you are in the Aryan Brotherhood for life. That is where we get the expression such as blood in, blood out. Someone else has to bleed to get in. You bleed to get out.

Your Honor, I might hasten to add that although this sounds somewhat gruelish, we don't think it's important to get into this, is what he essentially wants to do is kill somebody in the prison. The point is that someone needs to explain a general set of ideals. In other words, we are looking at the

character of this man, David Dawson, and not only things that he does. We know some of the things he does. They will be explained by his prison record and this killing itself, but some of the things he believes in now or ascribes to. Whether he actually has killed in prison isn't important. What is important is for the jury to understand this is what he is into. This is his character. His character is he thinks the Aryan Brotherhood is a really neat organization and he believes in the things that they believe in. He wears their tattoo. He wears their belt. He carries their literature, he paints his wall and so forth.

As I said, the expert will identify for us or can identify and has identified only 120 full-fledged members that have done the things that are necessary for full membership. But he would also tell us that that group is an identified group of 120. The more complex individuals and the ones that create more disturbances within the institution and the ones that are seen as a great disturbanc within the institutions, are those such as Mr. Dawson who merely ascribe to that set of values because they don't, they are not identified as full-fledged members, but they are liable to act on those values at any time and the institutions can't know when that is going to happen for it is going to happen. It is just there.

I guess that is the extent of our proffer, Your Honor.

notice. But we would respectfully suggest to the Court that if the State is intending to use such a witness, an expert witness, we should have been told ahead of time. Since they did not, Your Honor, it would be within Your Honor's discretion to deny the use of this expert.

In terms of the substance of any testimony on the Aryan Brotherhood, we feel previously indicated that the testimony apparently would go to the defendant's beliefs, et cetera, which, although, many of us may not believe in his beliefs, I think his beliefs are protected by the First Amendment.

The State has indicated a few minutes ago that much of the testimony goes to the defendant's beliefs and for that reason also, we would suggest that such testimony would be improper.

THE COURT: Doesn't the joining of the Aryan Brotherhood provide at least some clue as to the character of the individual who would do that?

MR. SWIDRZBINSKI: Yes. It provides some clue as to his character, but our position is that when it shows his character by indicating what his beliefs are, he should not be punished for his beliefs. If the jury is to impose a death penalty, they should base it on the crimes for which he has been convicted today, his crimes in the past, actions that he has

done or failed to do. But he shouldn't be punished for some abstract thought of what he believes in that he has not acted upon. The fact that he may not like any of the people in this room is not really relevant if he has taken no action against anyone. What one individual thinks in his or her mind should not be a ground used to find a fact to give to condem that person to deatn.

THE COURT: Mr. Butler, doesn't evidence about the Aryan Brotherhood, as it exists or may exist elsewhere, present the potential of diverting the jury's attention away from Dawson's background and record and the circumstances of the crime?

MR. BUTLER: It does to the extent that we get bogged down in the minutia of the various state adaptations. I would agree with the Court. The State did not envision spending a morning with this expert, as I say, but we do think that the defendant's character is relevant and the fact that he would ascribe to a set of beliefs that are known to be held by the Aryan Brotners. In other words, if the defendant thought himself as a Swedenborgin, that is a Christian religion. I don't know too much about it, but I don't know if the FBI here does, but it is a Christian religion and it is a good religion. I know some people who are in it and they are good people. If that man was on trial for his life, it might make sense in litigation

for that defendant to be permitted to have someone testify as to what Swedenborgins are and what beliefs they hold, why someone would want to be a Swedenborgin and why and what that tells you about the man who is on trial. Likewise, Amish people or any other group. I mean, I merely flip it over to analytically we don't get bogged down with the fact that the defendant's particular beliefs manifest themselves through his membership in an organization that is committed to something other than laudable goals.

The fact that the group happens to be the Aryan Brotherhood shouldn't change the interest whether it's relevant and admissible and so forth, or whether it is unnecessary and unfairly diverts the jury's attention. The State's position is that the jury should be permitted to focus on the Aryan Brotherhood as an organization, as a recognized organization. But we would agree with the Court that there is no need for this expert to get into what a specific group does in Texas or what a specific group does in California.

Again, this expert is able, we think, to delineate between those goals that he could ascribe to the Aryan Brotherhood nationally as opposed to specifically state adaptations of the group. So we wouldn't, we would agree with the Court we didn't really want to get into a major or all afternoon discertation on this witness, of the Aryan Brotherhood, generally. But

believe in. But he has no contact with Delaware. How can he possibly give this jury relevant information which in any way would relate to David Dawson? He is basically going to be giving them inflammatory information which cannot be tied to the defendant.

THE COURT: Mr. Butler, is that so?

MR. BUTLER: Your Honor, again, I think that what we are doing here is we are confusing the specifics with the analytics that are necessary to be applied. This expert can tell us what the Aryan Brotherhood is in general terms. It is just like --

THE COURT: As it exists where?

MR. BUTLER: As it exists nationally. In other words, there are certain tenets of the Aryan Brotherhood that run through all of the organizations with which he is familiar in any state you want to state.

THE COURT: He does have knowledge about Delaware.

MR. BUTLER: He has knowledge of all the states with which he is familiar. He doesn't know about the Delaware chapter, so he can't tell us what the Delaware chapter does in that particular quirk or this particular angle. What he can tell us, just like he was going to describe Christianity. He can tell us what all Christians believe in. He can't tell us maybe

as to a specific tenet of Methodism or Catholicism, but he can tell us what Christians believe in. It is the same concept. Analytically he can tell us what the Aryan Brothers believe in. He can't tell us what Delaware Aryan Brothers believe in except to the extent that Delaware Aryan Brothers sort of per force must have the same general --

THE COURT: What is it again he would testify they would believe in?

MR. BUTLER: That's where my proffer starts to get thin, Your Honor, because I only talked to him for about 15 minutes.

MR. SWIERZBINSKI. We would suggest that if he doesn't know specifically what Delaware Aryan Brothers believe in, assuming there is such an organization and with the various beliefs differing throughout the country, he would be merely offering speculation even to the general Delaware Aryan Brotherhood tenets. If he doesn't know anything about this local organization, how does he have knowledge whether or not this local organization adheres to all tenets of the, let's call it the Aryan Brotherhood national. Any evidence that he gives will be purely speculative. It is speculative. It is irrelevant. It can't be tied into David Dawson unless the State can somehow tie that into the defendant. Specifically, all the State is

covered that in your proffer?

MR. BUTLER: Yes, Your Honor.

THE COURT: Other than perhaps painting his wall, has Mr. Dawson, in conjunction with his Aryan Brotherhood membership as it is purported to be, done anything unlawful while in prison?

MR. BUTLER: Well, he may well have, Your Honor. Nothing that we have caught him at.

THE COURT: Anything that the State could offer?

MR. BUTLER: No, Your Honor. As I said, it is understood that this witness' testimony would be with that caveat. We don't think it is important that whether he acted or not acted on his membership in this group -- what we think is important is that that is the kind of thing that he ascribes to. That is his character. He thinks that the Aryan Brotherhood is an organization that he wishes to align himself with. That is pretty clear. I mean, the minor premise, if you will, linking him to the group is pretty clear.

MR. SWIERZBINSKI: Your Honor, our position on that is if I may give Your Honor two examples. Let's assume for the sake of argument that the State would prove by some means that my client likes Adolph Hitler. Let's also assume that the State could prove by some means that my client likes the Pope.

If he takes no action based on his like for Adolph Hitler or like for the Pope or dislike for the Pope, so what. If it is a feeling he has, if it is a belief he has, it is totally irrelevant. If the State can tie that in, that because of his belief, he has acted in some improper way, then it becomes relevant. But if it is a belief, something that he has in his mind, it is totally irrelevant. The jury should not be permitted to consider that.

THE COURT: Are there any other evidentiary issues other than the Aryan Brotherhood membership that you are aware of now?

MR. WHARTON: Your Honor, one of the non-statutory aggravating circumstances which we have described to defense counsel relates to the Aryan Brotherhood. So it kind of assumes in that fascination with the Nazi symbolism and what not.

THE COURT: Do you have your written notes?

MR. WHARTON: We have just given them to defense counsel.

THE COURT: Do you have a copy for the Court?

MR. WHARTON: Yes. I didn't want to interrupt the discussion.

THE COURT: Continue.

MR. WHARTON: Yes. It is on Page 3 and it is

what I mean. Obviously, the swastika stands for certain things in the world and the fact that he seemed to have such an affection for them, I think is important in describing his character and propensities.

THE COURT: Mr. Swierzbinski.

MR. SWIERZBINSKI: Once again, Your Honor, our position is that if the State can only show a belief that is not sufficient; whether it is Nazism or Aryan Brotherhoodism or whatever. If they can tie that into an act because of my client's alleged Nazi beliefs that he specifically -- and let's say, for instance, incited a prison riot or whatever they want to, if they can tie it into an act, they should be entitled to introduce that. If it is something that this man has in his head and merely paints it on his wall, he shouldn't be put to death for that.

MR. WHARTON: Your Honor, I think that is fine. I mean if the defense is not inconsistent in their logic. If they want to introduce or if they think that things that he has done -- excuse me, organizations he has joined, beliefs he may hold that are good are admissible to show his character and propensities in a penalty hearing, then the same thing applies for beliefs and organizations he has joined which are bad. You can't have it both ways. They are either all in or all out.

If they want to stipulate they are not going to offer any testimony about good beliefs he has or good organizations he has joined, if he has never acted on those good beliefs or good organizations, then fine.

THE COURT: Well, I will narrow the issues to some extent. The Court does find that membership or the act of joining an organization of any particular kind, whether it be the Aryan Brotherhood or the Boy Scouts of American can be probative of character, at least to some extent. The real issue before the Court is whether the probative value is outweighed by the danger of unfair prejudice. So, let's focus the argument that way.

MR. WHARTON: Could we take a few minutes, Your Honor?

MR. BUTLER: Your Honor, I think we should talk about this for a couple minutes if the Court would indulge us.

THE COURT: All right.

MR. BUTLER: Thank you, Your Honor.

(Whereupon, a brief recess was taken.)

MR. WHARTON: Your Honor, we have reached what we call an agreement in principle but not in specifics yet, which would result in kind of a stipulation about the defendant's association with the Aryan Brotherhood and a brief description

into between the State and the defendant. Stipulation basically is an agreement that such evidence exists without the need for calling witnesses and that agreement, that stipulation will refer to a gang called the Aryan Brotherhood. You will hear evidence that the defendant is a member of the Aryan Brotherhood and the stipulation will include the fact that the Aryan Brotherhood is a racist, a white racist prison gang and, finally, you will hear evidence as to the defendant's own proclamation of his nickname Abaddon and we will find out in a few minutes what Abaddon means. Now, aside from those nonstatutory aggravating circumstances, that is the State's case.

The defense puts a case on should they choose to. The defense is not limited by any rule except that it be relevant to something in mitigation of the defendant's sentence; in other words, things that make it less appropriate for you to impose the ultimate penalty of death. They may produce anything at all or nothing at all should they choose not to.

Your function then will be to take the statutory aggravating circumstances, the nonstatutory aggravating circumstances and together to weigh them against those factors in mitigation of the potential sentence of the

Another measure of how successful an inmate might be: Parole. Six times before the parole board; six times he was not safe to put out on the street. Denied, denied, denied, denied, denied, denied.

The character and propensities of the defendant. We introduced evidence to you, ladies and gentlemen, about other things which go directly to his character and propensities. The Aryan Brotherhood is a white racist prison gang. What does that tell you about David Dawson? It is not just a casual association. He has branded himself with his tattoo Aryan Brotherhood.

Could have joined the JC's in prison. Could have gotten his GED. Could have done something good. What does he become? An Aryan brother. What does that say about his character and propensities?

He has taken the name Abaddon. We didn't tell you that because necessarily, or even for any religious reason, but it tells you something about what Abaddon means: The angle of the bottomless pit, one of Satan's disciples. What does that say about how he views himself, how he would like to be seen by other people? What purpose could there be in calling himself the angle of the bottomless pit, Abaddon, other than to tell people you better watch out for me. I am

bad.

This is not just a passing fancy, a fad, a phase in his life. It is a direction his life has turned. It is not just a nickname he goes by. He has marred his body with that tattoo: Abaddon. He is serious about this, ladies and gentlemen. All the way across his stomach A B A D D O N in block letters that high (indicating). He relishes that connotation, that impression of evil: The angle of the bottomless pit.

Those are the nonstatutory aggravating circumstances, ladies and gentlemen. Those are other reasons why -- those are the character, they reflect the character, the propensities of David Francis Dawson. They tell you what type of person he is.

They also call out for the death penalty and what is in response to that? What are you to way in balancing these statutory aggravating circumstances, these nonstatutory aggravating circumstances dealing with the nature and circumstances of the crime and the character and propensities of the defendant? What are you to weigh against all of that?

Well, he has earned some good time credits in jail. He has gone to AA a few times and if he keeps

DEBRA L. HOLT
Official Court Reporter

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

THE STATE OF DELAWARE	:	
vs.	:	Cr. A. Nos. IK-86-12-0024; IK-87-01-0834-0847
DAVID F. DAWSON	:	

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between Ferris W. Wharton, Esquire, and Charles E. Butler, Esquire, Attorneys for the State, and Paul S. Swierzbinski, Esquire, and Raymond J. Otlowski, Esquire, Attorneys for the Defendant, as follows:

The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.

FERRIS W. WHARTON, Esquire

CHARLES E. BUTLER, Esquire

PAUL S. SWIERZBINSKI, Esquire

RAYMOND J. OTLOWSKI, Esquire

DATED: June 27, 1988

APPLICABLE STATUTORY PROVISIONS

11 Del. C. Ann. §636, **Murder in the first degree; class A felony**, provides in pertinent part:

(a) A person is guilty of murder in the first degree when:

(1) He intentionally causes the death of another person;

(2) In the course of and in furtherance of the commission or attempted commission of a felony or immediate flight therefrom, he recklessly causes the death of another person;

(3) He, with criminal negligence, causes the death of another person in the course of and in furtherance of the commission or attempted commission of rape, kidnapping, arson in the first degree, or immediate flight therefrom;

(4) He causes the death of another person in order to avoid or prevent the lawful arrest of any person, or in the course of and in furtherance of the commission or attempted commission of escape in the second degree or escape after conviction.

(b) Murder in the first degree is a class A felony and shall be punished as provided in § 4209 of this title.

---

11 Del. C. §4209, **Punishment, procedure for determining punishment, review of punishment and method of punishment for first-degree murder.**, provides in pertinent part:

(a) Punishment for first-degree murder.- Any person who is convicted of first-degree murder shall be punished by death or by imprisonment for the remainder of his or her natural life without benefit of probation or parole or any other reduction, said penalty to be determined in accordance with this section.

(b) Separate hearing on issue of punishment for first-degree murder.-(1) Upon a conviction of guilt of a defendant of first-degree murder, the Superior Court shall conduct a separate hearing to determine whether the defendant should be sentenced to death or to life imprisonment without benefit of probation or parole as authorized by subsection (a) of this section. If the defendant was convicted of first-degree murder by a jury, this hearing shall be conducted by trial judge before that jury as soon as practicable after the return of the verdict of guilty . . . . . .

(c) Procedure at punishment hearing. (1) The sole determination for the jury or judge at the hearing provided for by this section shall be the penalty to be imposed upon the defendant for the conviction of first-degree murder. At the hearing, evidence may be presented as to any matter that the Court deems relevant and admissible to the penalty to imposed. The evidence shall include matters relating to any mitigating circumstance and to any aggravating circumstance, including, but not limited to, those aggravating circumstances enumerated in subsection (e) of this section. Notice in writing of any aggravating circumstances and any mitigating circumstances shall be given to the other side by the party seeking to introduce evidence of such circumstances prior to the punishment hearing, and after the verdict on guilt, unless in the discretion of the Court such advance notice is dispensed with as impracticable. The record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant or the absence of any such prior criminal convictions and pleas shall also be admissible in evidence

(2) At the hearing the Court shall permit argument by the State, the defendant and/or his counsel, on the punishment to be imposed. Such argument shall consist of opening statements by each, unless waived, opening summation by the State, rebuttal summation by the defendant and/or his counsel and closing summation by the State.

(3) Upon the conclusion of the evidence and arguments the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed.

(4) In the instructions to the jury the Court shall include instructions for it to weigh and consider any mitigating circumstances or aggravating circumstances and any of the statutory aggravating circumstances set forth in subsection (e) of this section which may be raised by the evidence. The jury shall be instructed to weigh any mitigating factors against the aggravating factors.

(d) Determination of sentence. (1) A sentence of death shall not be imposed unless the jury of judge, where appropriate, finds:

a. Beyond a reasonable doubt at least 1 statutory aggravating circumstance; and

b. Unanimously recommends, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that a sentence of death be imposed. Where the jury, or judge when applicable, submits such a finding and recommendation, the Court shall sentence the defendant to death as provided by subsection (f) of this section. A finding by the jury of a statutory aggravating circumstance, and a consequent recommendation of death, supported by the evidence, shall be binding on the Court . . . . . .

(3) If the jury, or judge when applicable, cannot unanimously find that at least 1 statutory aggravating circumstance exists and cannot unanimously recommend death, the Court shall sentence the defendant to life imprisonment without benefit of probation or parole.

(e) Aggravating circumstances. (1) In order for a sentence of death to be imposed, the jury, unanimously, or judge when applicable, must find that the evidence established beyond a reasonable doubt the existence of at least 1 of the following aggravating circumstances which shall apply with equal force to accomplices convicted of such murder:

a. The murder was committed by a person in, or who has escaped from, the custody of a law-enforcement officer or place of confinement . . . . . .

j. The murder was committed while the defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any degree of unlawful sexual intercourse, arson, kidnapping, robbery, sodomy or burglary . . . . . .

o. The murder was committed for pecuniary gain . . . . . .

(2) In any case where the defendant has been convicted of murder in the first degree in violation of any provision of § 636(a)(2)-(7) of this title, that conviction shall establish the existence of a statutory aggravating circumstance and the jury, or judge where appropriate, shall be so instructed. This provision shall not preclude the jury, or judge where applicable, from considering and finding the statutory aggravating circumstances listed in this subsection and any other aggravating circumstances established by the evidence . . . . . .

(g). Automatic review of death penalty by Delaware Supreme Court . . . . . .

(2) The Supreme Court shall limit its review under this section to the recommendation on and imposition of the penalty of death and shall determine:

a. Whether, considering the totality of evidence in aggravation and mitigation which bears upon the particular circumstances or details of the offense and the character and propensities of the offender, the death penalty was either arbitrarily or capriciously imposed or recommended, or disproportionate to the penalty recommended or imposed in similar cases arising under this section.

b. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection (e) of this section and, where applicable, § 636(a)(2)-(7) of this title.

ORIGINAL

No. 90-6704 (4)

Supreme Court, U.S.
FILE
OFFICE OF THE

IN THE SUPREME COURT OF THE UNITED STATES

October

DAVID

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF DELAWARE

RESPONDENT'S BRIEF IN OPPOSITION

OBERLY, III
General of the
Delaware

BANKS, JR.
Chief
Division

HITCHENS
Deputy Attorney General

Department of
Street
Box 508
, DE
656-5352

BEST AVAILABLE COPY

COUNTER-QUESTION PRESENTED

Delaware uses a "Georgia" or "Gregg" type of procedure for determining who shall be sentenced to death after being convicted of first-degree murder. Under such a scheme, did it contravene either the First or the Eighth Amendment, for the sentencing jury to consider, as a factor in deciding whether death is the appropriate penalty, prosecution evidence that the defendant belonged to a "white racist prison gang" calling itself the "Aryan Brotherhood?"

TABLE OF CONTENTS

	Page
COUNTER-QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	2
COUNTER-STATEMENT OF THE CASE	2
REASON FOR DENYING THE WRIT	
THE DECISION BELOW WAS CONSISTENT WITH THE PRIOR OPINIONS OF THIS COURT	15
1. Delaware's Capital Sentencing Statute	17
2. The Prosecution Can Present Aggravating "Character" Evidence	18
3. Dawson's Membership in a "White Racist Prison Gang" Was Relevant "Character" Evidence	20
4. Introduction of the Aryan Brotherhood Evidence Did Not Contravene the First Amendment	23
CONCLUSION	27

TABLE OF AUTHORITIES

Cases	Page
Arizona v. Walton, 110 S.Ct. 3047 (1990)	20
Barclay v. Florida, 463 U.S. 939 (1983)	passim
Beauharnais v. Illinois, 343 U.S. 250 (1952)	28
Boyde v. California, 110 S.Ct. 1190 (1990)	21
Brandenburg v. Ohio, 395 U.S. 444 (1969)	24
California v. Brown, 479 U.S. 538 (1987)	15, 25
Collin v. Smith, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978)	28
Commonwealth v. Abu-Jamal, 555 A.2d 846 (Pa. 1989), cert. denied, 111 S.Ct. 215 (1990)	13, 16
DeShields v. State, 534 A.2d 630 (Del. 1987), cert. denied, 486 U.S. 1017 (1988)	18
Flamer v. State, 490 A.2d 104 (Del. 1983 and 1985), cert. denied, 464 U.S. 865 (1983) and 474 U.S. 865 (1985)	17
Franklin v. Lynaugh, 487 U.S. 164 (1988)	passim
Gregg v. Georgia, 428 U.S. 153 (1976)	17, 24
Penry v. Lynaugh, 109 S.Ct. 2934 (1989)	15, 19
Riley v. State, 496 A.2d 997 (Del. 1985), cert. denied, 478 U.S. 1022 (1986)	18
Skipper v. South Carolina, 476 U.S. 1 (1986)	20
State v. Barclay, 470 So.2d 691 (Fla. 1985)	26
State v. White, 395 A.2d 1082 (Del. 1978)	17
United States v. Lemon, 723 F.2d 922 (D.C. Cir. 1983)	17
Witherspoon v. Illinois, 391 U.S. 510 (1968)	28
Woodson v. North Carolina, 428 U.S. 280 (1976)	19
Zant v. Stephens, 462 U.S. 862 (1983)	16, 19

Constitution and Statutes

United States Constitution: Amend. 1	16, 23
Amend. 8	16, 23
Del. Code Ann. tit. 11: § 636 (1987)	3
§ 4209	passim

Treatises and Articles

L. Tribe, American Constitutional Law (2nd. ed. 1988)	26
Weisberg, Deregulating Death, 1983 Sup. Ct. Rev. 305	27

No. 90-6704

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

DAVID F. DAWSON,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF DELAWARE

RESPONDENT'S BRIEF IN OPPOSITION

The State of Delaware, respondent, asks this Court to deny David Dawson's petition. In its opinion of October 4, 1990, the Delaware Supreme Court ruled that evidence of Dawson's membership in a prison gang called the "Aryan Brotherhood" had been properly put before his capital sentencing jury. Because that conclusion is consistent with the prior decisions of this Court, review here is not warranted. However, if the members of this Court believe that the question posed by this petition is a substantial one, or has not been definitively resolved by earlier decisions, the State asks that the Court grant this petition now in order to

prevent the issue from festering during the inevitable subsequent rounds of federal habeas corpus review.

OPINION BELOW

The opinion of the Delaware Supreme Court is now officially reported at 581 A.2d 1078 (Del. 1990). It is reproduced in the Appendix to the Petition for Certiorari at pages 1 through 71.

COUNTER-STATEMENT OF THE CASE

1. The Murder

On December 1, 1986, David Dawson was, as he had been almost all of his adult life, an inmate at the Delaware Correctional Center. That morning, Dawson and three other inmates escaped from the prison. Once outside, the group split up. The three other prisoners stole a car and fled north towards Wilmington; Dawson took another car and drove southward. Outside of the small rural community of Kenton, Dawson broke into a home and stole a leather jacket and several pocket watches. He then his attention to the home of Richard and Marie Kisner, just down the road. There, he surprised Mrs. Kisner as she was preparing to go to work. Dawson brutally murdered her. When her thirteen year old son returned home later that day after school, he found his mother's body in her bedroom. She had been bound with shoelaces, gagged with a sock, strangled, and repeatedly stabbed in the chest. Pet. App., Opinion ("Op.") at 4-8.

Still fleeing southward, but now with Mrs. Kisner's car, Dawson appeared later that evening outside a bar wearing the

leather jacket. Inside the bar, he gave a woman one of the watches taken during the first break-in. When he was finally apprehended a few hours later, Dawson was still wearing the stolen jacket, stained with Mrs. Kisner's blood and bearing fibers from her housecoat. Inside the coat's pocket was the match to the sock used to gag Mrs. Kisner along with other items taken during the two burglaries. Pet. App., Op. at 10-11.

2. The Trial

The subsequent indictment charged Dawson with first-degree murder under four separate counts. One count alleged that Dawson had intentionally killed Mrs. Kisner; a second charged that he had killed her during the course of an escape; and two others charged that he had killed her during the commission of the felonies of robbery and burglary. Del. Code Ann. tit. 11 § 636(a)(1), (a)(2), (a)(6), (a)(7) (1987).[1] At trial, the defense admitted that Dawson had been in the Kisners' house and had helped subdue Mrs. Kisner but suggested, as Dawson had offered to the police in a post-arrest statement, that the woman had been killed by the other three escapees when he had gone outside. The jury returned guilty verdicts on all of the charges including the four murder counts.

[1]Dawson was also charged with eleven other crimes arising from his spree after his escape from prison. Prior to trial, he pled guilty to the crimes of burglary and theft for the first break-in.

3. The Penalty Hearing

Before the trial had begun, Dawson had asked the trial court to keep the prosecution from introducing any evidence linking him with a prison gang known as the "Aryan Brotherhood." At that time, the trial court conditionally barred any evidence relating to the gang during the guilt-innocence phase of the proceedings. Pet. App., Op. at 13-15; Tr. A-23 (Pet. App. A77). After ne was convicted, Dawson renewed his application to preclude evidence about his association with the "Aryan Brotherhood." In addition, he asked the trial court to also prohibit any evidence indicating that he bore a large tattoo of the name "Abaddon" on his stomach or any evidence that he had used that moniker.

In response, the prosecution represented that during the upcoming penalty hearing it intended to introduce: (1) testimony, from an expert employed by the federal prison system, about the origin, nature, and central tenets of the "Aryan Brotherhood;" (2) photographs showing a tattoo with the words "Aryan Brotherhood" on Dawson's hand and other tattoos of swastikas on his back; (3) a photograph showing that Dawson had painted a large swastika on his prison cell; and (4) other articles found in Dawson's belongings which bore insignia of the "Aryan Brotherhood" and swastikas or which referred to "white supremacy." Tr. L-56 to L-63 (Pet. App. A82-86). The prosecutors admitted that they would be unable to show that Dawson had done anything unlawful while in prison in conjunction with his membership in the Aryan Brotherhood. However, they proposed that the proffered evidence was admissible to show "the

kind of thing [Dawson] ascribes to. That is his character." Tr. L-79 (Pet. App. A92). Similarly, the prosecution represented that it intended to put before the jury a photograph of Dawson's stomach tattoo as well as testimony that, after the murder, he had referred to himself as "Abaddon," explaining that the name meant "one of Satan's disciples." Tr. M-22. The defense argued that all of this evidence was both irrelevant and inflammatory and that, in particular, the introduction of the Aryan Brotherhood evidence, although it might admittedly provide "some clue" to Dawson's character, would allow the jury to punish Dawson for his beliefs contrary to the First Amendment. Tr. L-69 to L-82 (Pet. App. A87-94); Pet. App., Op. at 47-48. After extensive argument, the trial court ruled:

> The Court does find that membership or the act of joining an organization of any particular kind, whether it be the Aryan Brotherhood or the Boy Scouts of America[] can be probative of character, at least to some extent. The real issue before the Court is whether the probative value is outweighed by the danger of unfair prejudice. So let's focus the argument that way.

Tr. M-83 (Pet. App. A95); Pet. App., Op. at 48. However, before the trial court could make its final ruling on admissibility of the evidence concerning the Aryan Brotherhood, the prosecution and defense reached an accord. Under the agreement, the prosecution could introduce the picture of Dawson's hand with the Aryan Brotherhood marking and the jurors would be told:

> The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.

Stipulation (Pet. App. A99); Pet. App., Op. at 48-49. Based on the stipulation, the trial judge ruled that any evidence showing swastikas could not be introduced. Turning to the evidence about "Abaddon," the trial court found that the proffered evidence was relevant and not unduly prejudicial. Tr. M-27; Pet. App., Op at 49-50.

When the penalty hearing began, the prosecution relied on the existence of three statutory aggravating circumstances - two of which the jury had already found by their prior guilty verdicts - to render Dawson prima facie eligible for the death penalty under Delaware's "Georgia-type" capital punishment statute.[2] Thus, in its evidentiary presentation, the prosecution concentrated on what it billed to the jurors as "non-statutory" aggravating circumstances. The presentation was three-pronged. First, the prosecution offered records detailing Dawson's long criminal history, including:

a. an initial commitment to a juvenile correctional facility at age thirteen;

---

[2]The three statutory aggravating circumstances were: (1) the murder was committed by an escapee; (2) the murder was committed during the commission of a burglary or robbery; and (3) the murder was committed for pecuniary gain. Del. Code Ann. tit. 11, § 4209(e)(1)(a), (e)(1)(j), (e)(1)(o) (1987). Under the Delaware statute, the jury's earlier verdicts finding Dawson guilty of killing during the commission of a burglary and a robbery and in the course of an escape automatically established the first two of the above statutory aggravating circumstances. Del. Code Ann. tit. 11, § 4209(e)(2) (1987). In the court's charge to the jury at the end of the penalty hearing, the court told the jury to mark the special verdict interrogatory in accord with that statutory directive. Tr. N-79 to N-80.

b. five subsequent commitments to juvenile facilities from 1968 to 1973;

c. three escapes from maximum security juvenile facilities;

d. fourteen adult felony convictions, dating back to 1973, for crimes centering on thefts, escapes, and illegally possessing weapons;

e. three prior escapes from adult correctional supervision; and

f. twenty-four conduct violations while incarcerated.

Tr. M-40 to M-84; State's Exhs. 65-85; Pet. App., Op. at 51 & n. 25. Secondly, the prosecution, consistent with the prior agreement, introduced the picture of Dawson's right hand showing a tattoo with the name "Aryan Brotherhood" and read to the jury the stipulation describing the Brotherhood as a "white racist prison gang." State's Exhs. 86 & 87; Tr. M-100 to M-102; Pet. App., Op. at 48. The prosecution then completed its presentation by putting introducing the "Abaddon" evidence, starting with the picture of Dawson's stomach showing the tattoo. State's Exh. 88; Tr. M-104. At the same time, a police officer, relying on a dictionary, told the jury that the term was a biblical one, meaning "angel of the bottomless pit." Tr. M-108. And finally, the woman Dawson had met at the bar the evening after the murder testified that Dawson had introduced himself to her as "Abaddon" and had told her the name meant "one of Satan's disciples." Tr. M-96 to M-97; Pet. App., Op. at 49.

Although Dawson chose not to testify at the penalty hearing, the defense did counter with mitigating evidence. First, defense counsel, during his cross-examination of the prison records

clerk, elicited testimony that Dawson, during his earlier years in prison, had earned "quite a few" good time credits by enrolling in drug and alcohol treatment programs, by attending group counseling, and by working in prison industries. Tr. M-88. Secondly, Dawson's half-sister and aunt both told the jury that they still loved Dawson, despite all his prior crimes, and that they continued to visit him in prison each month. And lastly, Dawson's aunt recounted how Dawson had never known his father, how he had been raised primarily by his grandmother, and how he once had offered to donate one of his kidneys to save a dying niece. Tr. M-109 to M-118.

In their penalty hearing summation, the prosecutors focused on the statutory criteria of the "circumstances . . . of the offense" and the "character and propensities of the offender." Del. Code Ann. tit. 11 § 4209(d)(1)(b) (1987). When they turned to the latter, they integrated the evidence concerning Dawson's criminal record, his use of the name Abaddon, and his identification with the Aryan Brotherhood into a central theme that Dawson's "character" was incorrigible and that his whole life reflected a continued choice to reject any redeeming paths. Thus, after detailing the long history of his illegal conduct inside, as well as outside, of prison, one of the prosecutors told the jurors:

> . . . We introduced evidence to you, ladies and gentleman about other things which go directly to his character and propensities. The Aryan Brotherhood is a white racist prison gang. What does that tell you about David Dawson? It is not just a casual

association. He has branded himself with his tattoo Aryan Brotherhood.

Could have joined the JC's in prison. Could have gotten his GED. Could have done something good. What does he become? An Aryan brother. What does that say about his character and propensities?

Tr. N-37 (Pet. App. A97). Then, alluding to the "Abaddon" evidence, the prosecutor continued in the same vein:

He has taken the name Abaddon. We didn't tell you that because necessarily, or even for any religious reason, but it tells you something about what Abaddon means: The ang[el] of the bottomless pit, one of Satan's disciples. What does that say about how he views himself, how he would like to be seen by other people? What purpose could there be in calling himself the angel of the bottomless pit, Abaddon, other than to tell people you better watch out for me. I am bad.

This is not just a passing fancy, a fad, a phase in his life. It is a direction his life has turned. It is just not a nickname he goes by. He has marred his body with that tattoo: Abaddon. He is serious about this, ladies and gentlemen. All the way across his stomach A B A D D O N in block letters that high. He relishes that connotation, that impression of evil: the ang[el] of the bottomless pit.

Those are the non-statutory aggravating circumstances, ladies and gentlemen. Those are other reasons why - those are the character, they reflect the character, the propensities of David Francis Dawson. They tell you what type of person he is.

Tr. N-37 to N-38 (Pet. App. A97-98). And finally the prosecutor compared these circumstances to Dawson's evidence in mitigation:

How do those meritorious good time credits stack up against the bad conduct, the felony conviction? Where is going to AA compare with proclaiming yourself an Aryan brother? Where does abstinence of alcohol,

where does temperance range in his list of priorities compared to associating himself with a racist gang?

What does that tell you about the significance of those mitigating circumstances? Where do the few picnics at the prison, how do they weigh against his repeated escapes and his weapon charges in jail?

Where does the love of [a] half sister who sees him two or three times a month weigh against the real David Dawson who 7 days a week, 35 [sic] weeks a year is Aryan brother David Dawson, is Abaddon?

Tr. N-39. When he addressed the jury, defense counsel conceded that Dawson was an Aryan Brother and a white supremacist. Tr. N-51. But, alluding to "freedom of speech" and "freedom of thought," he cautioned the jurors that they should not give any weight to those facts, or similarly to Dawson's use of the name Abaddon, because the prosecution had not linked either his membership in the gang or his use of the name Abaddon to any harm or any disturbances while Dawson had been in prison. If they gave effect to such evidence, they would be sentencing Dawson to death because of what he believes. Tr. N-50 to N-53. He told the jury that the testimony about Dawson's prison jobs and program enrollment demonstrated that Dawson was "not just sitting in prison lying around doing nothing" but had made some "attempts to do certain things to at least improve his life." Tr. N-62. And if that evidence was not sufficient to warrant imprisonment rather than death, defense counsel suggested to the jurors that they should exercise mercy simply because there were people, such

as his aunt and half-sister, who still cared for Dawson. Tr. N-61 to N-62.

In rebuttal, the prosecutors again emphasized the purpose for introducing the Aryan Brotherhood and Abaddon evidence:

> And he accuses the State of having introduced inflammatory terms in this case: the Aryan Brotherhood and Abaddon. And he says well, if he has these thoughts, what's the harm?
>
> We are not required, ladies and gentlemen, to show there is another harm in the word Abaddon. It doesn't even make sense that there is. Obviously there isn't. If he wants to call himself Abaddon, fine. If he wants to join the Aryan Brotherhood, fine. If he wants to join the JC's, fine.
>
> You can bet if he joined the JC's you would heard about that in mitigation. You can bet if he joined the Kiwanis Club you would have heard about that in mitigation because it reflects upon the defendant's character. It tells us something about him.
>
> And what did Patty Dennis tell us about. It tells us something about the defendant that within 12 hours of this crime, of this brutal murder, he is describing himself to a complete stranger as one of Satan's disciples. It tells us something. Not that there is harm in it, but we are looking at the character of the defendant.

Tr. N-67.

After deliberating two hours, the jurors returned their verdict, reporting that they found the existence of all three statutory aggravating circumstances beyond a reasonable doubt and that they unanimously recommended that Dawson be sentenced to death. The trial court, bound by law to accept the recommendation, sentenced Dawson to die by lethal injection.

4. Appeal to the Delaware Supreme Court

Dawson appealed, arguing, as one of his challenges, that the the Aryan Brotherhood and Abaddon evidence should not have been permitted at the penalty hearing. The Delaware Supreme Court affirmed. It found that under Delaware's capital punishment scheme, the sentencing jury was permitted to consider a wide range of evidence, both in mitigation and aggravation, which relate to "all the specific circumstances of the crime and the defendant." Pet. App., Op. at 50 (internal quotation omitted). The court recognized that the main thrust of the prosecution's evidence during the penalty hearing was to show that Dawson's murder of Marie Kisner was in keeping with the incorrigible nature of his character. It found that under Delaware's scheme, the prosecution could offer the Abaddon and Aryan Brotherhood evidence to show that character. According to the court, Dawson's selection and use of the name Abaddon "was relevant to his character because it was a reflection of how Dawson viewed himself and how he wanted to be viewed." Pet. App., Op. at 52. So too, Dawson's decision to join a prison gang was also relevant to the issue of his character because his "affiliation with this type of organization was not only indicative of how he identified himself and how he wanted to be identified by others but again was characteristic of his lawless nature and rejection of rehabilitation during his incarceration." Id.

After having found the evidence relevant, the court turned aside Dawson's contention that the use of this evidence violated the First Amendment. Adopting the rationale of the Pennsylvania

Supreme Court in rejecting a similar challenge, the Delaware court ruled "'[p]unishing a person for expressing his views or for associating with certain people is substantially different from allowing . . . evidence of [the defendant's] character [to be considered] where that character is a relevant inquiry.'" Pet. App., Op. at 54 (quoting Commonwealth v. Abu-Jamal, 555 A.2d 846, 859 (Pa. 1989), cert. denied, 111 S.Ct. 215 (1990)). Finding that the Aryan Brotherhood and Abaddon evidence had been presented in a manner "which did not shift the jury's attention away from the issue of Dawson's character," the court concluded that the admission of such evidence during the penalty hearing did not violate Dawson's constitutional rights. Pet. App., Op. at 56.

Finally, the Delaware Supreme Court also surveyed Dawson's death sentence under the state law requirement that it also determine whether, "considering the totality of the circumstances of evidence in aggravation and mitigation which bears upon the particular circumstances or details of the offense and the character and propensities of the offender, the death penalty was either arbitrarily or capriciously imposed . . . or disproportionate to the penalty imposed in similar cases . . . ." Del. Code Ann. tit. 11, § 4209(g)(2)(a) (1987). It concluded that "the weight of the statutory and non-statutory aggravating circumstances completely overwhelmed the mitigating circumstances." Pet. App., Op. at 66-67. In light of the fact that the record reflected "three statutory aggravating circumstances, significant non-statutory aggravating

circumstances, and virtually no evidence of mitigation," Pet. App., Op. at 68, Dawson's death sentence was neither arbitrary nor disproportionate.

REASON FOR DENYING THE PETITION

THE DECISION BELOW WAS CONSISTENT WITH THE PRIOR OPINIONS OF THIS COURT

The evidence at the penalty hearing clearly showed that David Dawson saw himself as a member of a "white racist prison gang" calling itself the "Aryan Brotherhood." The question presented by this petition is whether the capital sentencing jury, in deciding Dawson's fate, was entitled to consider that factor in making its "'reasoned moral response to the defendant's background, character, and crime.'" Penry v. Lynaugh, 109 S.Ct. 2934, 2947 (1989) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (concurring opinion)). The court below held that it was. According to the state court, Dawson's "membership in the Aryan Brotherhood, as well as the nature and origin of that group was relevant to Dawson's character[;]" his "affiliation with this type of organization was not only indicative of how he identified himself and how he wanted to be identified by others, but again was characteristic of his lawless nature and rejection of rehabilitation during his incarceration." Pet. App., Op. at 52.

In contrast, Dawson now contends that the presentation of such evidence contravenes the federal constitution in two ways.[3]

---

[3]In the state courts, Dawson also argued that his sentencing jury should not have been allowed to see his tattoo bearing the name "Abbadon" nor hear that he had used that name and described himself as "one of Satan's disciples" hours after his murder of Mrs. Kisner. Pet. App., Op. at 49-56. In this Court, Dawson does not press a challenge to that evidence.

First, he suggests that the constitutional imperative of "individualized" capital sentencing is a one-way mandate - allowing the defendant to offer his "positive" character traits and "redeeming" qualities in "mitigation" but barring the prosecution from offering any evidence of his less than admirable traits or the lack of any redeeming qualities. Pet. for Cert. at 17-19. Consequently, in this case, the Eighth Amendment precluded the prosecution from presenting the Aryan Brotherhood evidence as an aggravating circumstance. Secondly, he asserts that even if the prosecution can offer "character" evidence, that leeway does not extend to permitting the prosecution to offer evidence of the defendant's "beliefs" or "associations," such as mere membership in a racist prison gang, as indicia of his character. To do so, according to Dawson, would violate principles underlying the First Amendment and would allow a sentencing jury to decide a defendant's fate based on his beliefs. Pet. for Cert. at 20-22. The respondent believes that the prior opinions of this Court have rejected both of Dawson's challenges. Indeed, one need not look any further than the various opinions in Zant v. Stephens, 462 U.S. 862 (1983) and Barclay v. Florida, 463 U.S. 939 (1983) to turn back this petition.[4]

---

[4]The Pennsylvania Supreme Court has also ruled that a defendant's membership in a group may be relevant "character" evidence in a capital sentencing penalty hearing. Commonwealth

(Footnote Continued)

1. Delaware's Capital Sentencing Statute

Delaware uses a "Georgia" or "Gregg"[5] procedure for determining when a convicted murderer should be sentenced to die. Flamer v. State, 490 A.2d 104, 134-36 (Del. 1983 and 1985), cert. denied, 464 U.S. 865 (1983) and 474 U.S. 865 (1985); State v. White, 395 A.2d 1082, 1085 (Del. 1978). Thus, the sentencing jury cannot impose the death sentence unless it first finds the existence of at least one of the listed statutory aggravating circumstances. Such a finding makes the defendant presumptively subject to the sentence of death. Del. Code Ann. tit. 11, § 4209(d)(1)(a), (e)(1) (1987). But even with such a finding, death cannot be imposed unless the jury also unanimously recommends such a sentence "after weighing all relevant evidence in aggravation or mitigation which bears upon the circumstances or details of the commission of the offense and the character and propensities of the offender." § 4209(d)(1)(b).[6] The sentencing scheme also envisions that in making the second determination,

(Footnote Continued)
v. Abu-Jamal, 555 A.2d 846, 858-59 (Pa. 1989), cert. denied, 111 S.Ct. 215 (1990). In contrast, one federal court of appeals, in a non-capital case, has held that the First Amendment bars using the defendant's membership in a group as an aggravating factor for sentencing purposes unless it is shown that the group has illegal aims and the defendant specifically intended to further those aims. United States v. Lemon, 723 F.2d 922, 936-41 (D.C. Cir. 1983).

[5]Gregg v. Georgia, 428 U.S. 153 (1976).

[6]Under the Delaware statute, the sentencing jury is not given any instructions about the weight of any "aggravating" and "mitigating" circumstances or how to perform any "weighing" process. In fact, typically, as happened in this case, the
(Footnote Continued)

the jury should "'have as much information before it as possible.'" Pet. App., Op. at 54 (quoting Gregg, 428 U.S. at 204 (plurality opinion)). At the penalty hearing, "evidence may be presented as to any matter that the [c]ourt deems relevant and admissible to the penalty to be imposed," encompassing "matters relating to any mitigating circumstances and to any aggravating circumstances, including, but not limited to," the listed statutory aggravating circumstances. § 4209(c)(1). Consequently, the prosecution is not confined to presenting evidence relating to the statutory aggravating circumstances. Riley v. State, 496 A.2d 997, 1022, 1023 (Del. 1985), cert. denied, 478 U.S. 1022 (1986). Instead, both the prosecution and defense may offer a wide range of evidence material to "all the specific circumstances of the crime and the defendant." White, 395 A.2d at 1089. See, e.g., DeShields v. State, 534 A.2d 630, 649 (Del. 1987) (defense offered "mitigating" evidence that accused was model prisoner, that relatives still loved him, and that he had had troubled youth), cert. denied, 486 U.S. 1017 (1988).

2. The Prosecution Can Present Aggravating "Character" Evidence

First of all, contrary to Dawson's assertion, the Eighth Amendment does not require that the states restrict evidence of a defendant's "character or background" to that which would point

(Footnote Continued)
jurors are told that their power to grant mercy is unconstrained and absolute: that "regardless of the circumstances, you in your discretion may recommend a sentence of life imprisonment." Pet. App., Op. at 62 n. 30.

towards "mitigation." Of course, this Court has repeatedly emphasized that the "fundamental respect for humanity underlying the Eighth Amendment . . . requires the consideration of the character and record of the individual offender and the circumstances of the particualar offense as a consitutionally indispensable part of the process of inflicting the death penalty." Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion). See also Penry, 109 S.Ct. at 2947. But, this Court has never suggested that this "individualized" inquiry into the appropriateness of the sentence of death must be asymmetrical. Thus, eight years ago, this Court emphasized that nothing in the federal Constitution precludes the states from allowing the prosecution to present, for consideration by the sentencer, evidence of "aggravating" circumstances or factors beyond the criteria used by the legislature to narrow the class of those who are prima facie eligible to be sentenced to death. Zant v. Stephens, 462 U.S. 862, 868 (1983) ("But the Consitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among the class, those defendants who will actually be sentenced to death."). Nor must the states apply a narrower test of relevancy when the evidence is being proferred by the prosecution as an "aggravating factor" rather than by the defendant in "mitigation." Prosecution evidence can be "relevant" to the capital sentencing process if its value is to negate the existence of circumstances that otherwise might plausibly be offered as mitigating factors. Barclay v. Florida, 463 U.S. 939, 956 (1983) (plurality opinion);

id. at 970 (Stevens, J., concurring). For both the prosecution and the defense, the governing test of relevancy is whether the "information is relevant to the character of the defendant or the circumstances of the crime." Barclay, 463 U.S. at 967 (Stevens, J., concurring).

3. Dawson's Membership in a "White Racist Prison Gang" Was Relevant "Character" Evidence

Admittedly, this Court has never specifically defined the term "character" when used to describe evidence which is relevant to capital sentencing. Franklin v. Lynaugh, 487 U.S. 164, 178 (1988) (plurality opinion). But as Justice Scalia has recently said, the term has come to be seen - at least on the mitigation side - as any evidence which might be understood as "rendering the defendant less deserving of the death penalty" such as:

> that the defendant had a poor and deprived childhood, or that he had a rich and spoiled childhood; that he had a great love for the victim's race, or that he had a pathological hatred for the victim's race; that he has limited mental capacity, or that he has a brilliant mind which can make a great contribution to society; that he was kind to his mother, or that he despised his mother.

Arizona v. Walton, 110 S.Ct. 3047, 3062 (1990) (Scalia, J., concurring). Clearly, the evidence deemed relevant to the individualized sentencing determination goes far beyond those factors associated with the traditional understanding of the terms "culpability" or "excuse." Skipper v. South Carolina, 476 U.S. 1, 4 (1986). Instead, the catchwords "character" and "background" are now taken to encompass any evidence which "tells the sentencer something about the defendant's personality."

Franklin, 487 U.S. at 190 (Stevens, J. dissenting). For example, relevant "character" evidence may include "evidence of honorable military service or kindness to those in the defendant's community or regular church attendance," id., or even testimony that the defendant, while in prison, won a prize for his dance choreography, Boyde v. California, 110 S.Ct. 1190, 1199 n. 5 (1990). That type of evidence, "may suggest that the conduct of which defendant stands convicted was not in keeping with his or her usual qualities or traits." Franklin, 478 U.S. at 190 (Stevens, J., dissenting). Or, it might suggest that his "character was not without some redeeming features," Franklin, 478 U.S. at 189 (Stevens, J. dissenting): that he still posesses "positive character traits that mitigate against the death penalty." Id. at 186 (O'Connor, J. concurring).

But, if it is "relevant" (and constitutionally required) for the sentencing jury to hear any evidence which might allow it to determine that the defendant's "criminal conduct was an aberration from otherwise good character," Boyde, 110 S.Ct. at 1199 n. 5, or that he has "virtues that can be fairly balanced against society's interest in killing him in retribution for his violent crime," Franklin, 487 U.S. at 189 (Stevens, J., dissenting), then it must be "relevant" for the sentencing jury to hear evidence, offered by the prosecution, that the defendant lacks counter-balancing redeeming qualities and that the crime for which he was convicted, rather then being an aberration, was consistent with his evil character.

As the court below recognized, the evidence offered by the prosecution pointing towards Dawson's membership in the prison gang called the Aryan Brotherhood fell well within these parameters for "character" evidence. First, the evidence was "relevant to show the appropriateness of the alternative punishment of imprisonment for him, another reflection of his character." Franklin, 487 U.S. at 190-91 (Stevens, J., dissenting). As the prosecutor explained to the jury (see infra at 8-10), Dawson's decision to join a prison gang was the counter-point to his participation in prison programs during his long years of incarceration. The jurors could infer from the fact that Dawson had had the gang's insignia tattooed on his body that his enthusiasm for the gang far outran his commitment to participating in rehabilitative prison programs. And against the backdrop of a history of escapes and instances of institutional misconduct, his decision to join a gang could be seen as one more indication of Dawson's consistent mindset to reject any meaningful attempt to rehabiliate himself. In addition, as set out more fully below, the evidence that the prison gang Dawson chose to join was a "racist" one tended to diminish any contention that Dawson had substantial "redeeming virtues" which might tilt the balance against sentencing him to die in retribution for his crime of killing Marie Kisner.[7]

---

[7]Although Dawson does not here challenge in this Court the "Abaddon" evidence offered at the penalty hearing, it too fell within the common understanding of the scope of relevant
(Footnote Continued)

The introduction, by the prosecution, of evidence of Dawson's association with the prison gang called the Aryan Brotherhood did not offend the Eighth Amendment.

4. Introduction of the Aryan Brotherhood Evidence Did Not Contravene the First Amendment

Dawson's second argument is that the introduction of the Aryan Brotherhood evidence also contravened values underlying the First Amendment. Ironically, on this question the State and Dawson start on common ground. Both agree that a person's choice to associate with a particular group, much like the expression of one's views or beliefs (or indeed like any other voluntary conduct), does indeed communicate something about a person's personality or "character." But Dawson argues that once the prosecution offered evidence that Dawson is a member of a "white racist" gang and then used that association as indicia of his "character," the door was opened for the capital sentencing jurors to sentence Dawson to die simply because they found his "white suprmacist" beliefs morally abhorrent. To Dawson, that result - where the decision about life or death may rest upon the jurors' evaluation of the moral "rightness" or "wrongness" of Dawson's beliefs - constitutes impermissible "content

(Footnote Continued)
"character" evidence. Evidence that Dawson described himself as "Abaddon" - "one of Satan's disciples" - within hours after his murder crime and had earlier had that name branded onto his body was surely probative of whether Dawson, himself, saw his murder of Madeline Kisner as an act inconsistent with his usual qualities or traits.

discrimination" by the government inimical to the concept of "freedom of expression."

Dawson's First Amendment thrust misses its mark. First, neither Dawson's belief in "white supremacy" nor his membership in the "white racist prison gang" called the Aryan Brotherhood was the basis for the death sentence. Rather, Dawson was eligible to be sentenced to death because the jurors found him guilty of first-degree murder and then also found the existence of three statutory aggravating circumstances. It was those findings alone which announced "the community's belief that [the crime was] so grievous an affront to humanity that the only adequate response may be the penalty of death." Gregg, 428 U.S. at 184 (plurality opinion). Rather the evidence concerning Dawson's membership in the Aryan Brotherhood (and indeed the evidence concerning his use of the name Abaddon) became a relevant factor when the jury was then called upon to decide whether to forego exacting the retributive sanction. The difference is crucial. Thus, it may well be that the communal sense of tolerance implicit in the First Amendment bars legislatures from making the possession of a particular belief or the exercise of other constitutionally protected self-expressive activity a "threshold" statutory aggravating circumstance. Stephens, 462 U.S. at 885. Cf. Brandenburg v. Ohio, 395 U.S. 444, 446-49 & n. 1 (1969) (per curiam) (state may not criminalize expression of racist views). But a capital sentencing scheme need not be so "value" or "content" neutral at the stage where

the sentencing jury is called upon to determine whether to forego retribution and exercise leniency or mercy.

Indeed, this Court has just recently once again emphasized that this second determination should "reflect a reasoned moral response" by the sentencing jury. Penry, 109 S.Ct. at 2947. But if that is so - if "the individualized assesement of the appropriateness of the death penalty is a moral inquiry," California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring), - then "[i]t is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing." Barclay, 463 U.S. at 950 (plurality opinion).

In fact, in his concurring opinion in Barclay, Justice Stevens seemingly rejected the challenge Dawson makes here. Barclay had joined with three others to form a group, styled the Black Liberation Army. The shared tenets of the small group were hatred of white people and the need for a liberating racial war. To trigger such a clash, the members of the group kidnapped and killed a young hitchiker. In sentencing Barclay to die for this murder, the Florida sentencing judge had relied on his own abhorrence to the ideas of racial hatred and the need for a race war, indicating that he thought that anyone who chose to initiate such a diabolical course should be permanently removed from society by execution. 463 U.S. at 948 n. 6 (reproducing trial judge's findings). However, as Justice Stevens correctly surmised, "killing out of racial hatred" was not encompassed within any of Florida's statutory aggravating circumstances. See

State v. Barclay, 470 So.2d 691, 694-95 (Fla. 1985). Thus, the judge's deeply felt concern about racial crimes "had no bearing on any statutory aggravating cirmcumstance." Barclay, 463 U.S. at 970 (Stevens, J., dissenting). But, in Justice Stevens' view, that fact did not necessarily make Barclay's sentence illegitimate. Rather, the judge's reactions to Barclay's beliefs were valid considerations in the third stage of the Florida sentencing procedure, the stage when the sentencer had to exercise its discretion and determine if death was the appropriate penalty. Id. at 970 n. 18 (Stevens, J., concurring). At that stage, "[t]he sentencing process assumes that the trier of fact will exercise judgment in light of his or her background, experiences, and values." Id.[8]

---

[8]Of course, in Barclay, the defendant's views and beliefs in "racial hatred" had not been communicated simply by abstract expressions. They had been the motive for the murder he committed. But because "racial hatred" was not a statutory aggravating circumstance in Florida, when the sentencing judge condemned Barclay to die he was still, for traditional First Amendment analytical purposes, imposing a "penalty" on Barclay for holding those beliefs. As Professor Tribe has explained using an analogous hypothetical:

> To be sure, one who incites arson against an NAACP headquarters in a racist speech is more reprehensible than one who incites the very same arson to collect insurance proceeds, but to punish the former more severely than the latter is, arguably, to penalize a reprehensible viewpoint as such.

L. Tribe, American Constitutional Law § 12-17 at 926 (2nd. ed. 1988). In light of this, Dawson cannot distinguish his argument from the one rejected by Justice Stevens in Barclay simply on the basis that he had not acted on his racist beliefs.

That theme echoes throughout all of this Court's opinions requiring "individualized" sentencing determinations. For example, as noted above, it has been generally assumed that a capital defendant is constitutionally entitled to put before the sentencing jury evidence of his "regular church attendance." Franklin, 487 U.S. at 190 (Stevens, J., dissenting). He is entitled to do so because the sentencer may see such conduct as a "positive character trait," id. at 186 (O'Connor J., concurring), which might cause it to exercise leniency. As one commentator has noted, such type of evidence is relevant because, from such such testimony, the jurors may "see so much of the normal or good in the killer that they can rationalize his crime as an aberration." Weisberg, Deregulating Death, 1983 Sup. Ct. Rev. 305, 391. Yet, in order to draw that inference the jurors must necessarily make judgments in light of their perceptions of "community values." They must see religous devotion as something of sufficient "good," "redeeming" or "moral" value to tilt against retribution. And, of course, if they so conclude, and decide to spare the defendant's life on that basis, they are, in effect, "penalizing" those capital defendants who may have rejected religion and thus cannot offer evidence of religious devotion. In sum, what the prior opinions of this Court demonstrate is that the traditional First Amendment constraints against governmental viewpoint discrimination are not applicable when a capital sentencing jury is called upon to make the "reasoned moral response" whether "an individual has lost his

moral entitlement to live." Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).

Of course, even at this stage of capital sentencing, there are constraints on what may be considered relevant character evidence. If at this phase the sentencing jury acts as the communal moral voice of the community, then only those "values" upon which there is a broad community consensus can qualify for consideration by that jury. But this Court need not explore the extremes of those constraints in this case. There is a broad societal consensus that the doctrines of racism and "racial" supremacy are morally wrong. Cf. Beauharnais v. Illinois, 343 U.S. 250, 263-66 (1952) (suggesting speech promoting racial or religuous hatred is unprotected). Thus, while First Amendment values may estop us from banning the expression of racist beliefs, we need not endorse those who hold such views. See, e.g., Collin v. Smith, 578 F.2d 1197, 1200, 1203 (7th Cir.), cert. denied, 439 U.S. 916 (1978).

Here, the First Amendment did not bar introduction of the evidence of Dawson's membership in the Aryan Brotherhood.

CONCLUSION

For the above reasons, the respondent, State of Delaware, asks the Court to deny Dawson's petition for certiorari.

Respectfully submitted,

CHARLES M. OBERLY, III
Attorney General of the
State of Delaware

RICHARD E. FAIRBANKS, JR.
Chief of Appeals Division

GARY A. MYERS
Deputy Attorney General
Counsel of Record

LOREN C. MEYERS
Deputy Attorney General

Delaware Department of Justice
1 South Race Street
P.O. Box 508
Georgetown, DE 19947
(302) 856-5353

March 6, 1991

DISTRIBUTED
MAR 28 1991

ORIGINAL

No. 90-6704 (5)

Supreme Court, U.S.
FILED
MAR 28 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

DAVID F. DAWSON,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

ON **PETITION FOR A WRIT OF CERTIORARI**
TO THE SUPREME COURT OF THE STATE OF DELAWARE

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

BERNARD J. O'DONNELL
Counsel of Record

BRIAN J. BARTLEY
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, DE 19801
Tel.: (302) 577-3230

Attorneys for Petitioner

RECEIVED
MAR 28 1991
OFFICE OF THE CLERK
SUPREME COURT, U.S.

22 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT

A STATE MAY NOT USE EVIDENCE OF A CAPITAL DEFENDANT'S CONSTITUTIONALY PROTECTED BELIEFS AND ASSOCIATIONS AS AN AGGRAVATING CIRCUMSTANCE IN A PENALTY HEARING.

1. Delaware's Capital Sentencing Statute 2

2. Role of Aggravating "Character" Evidence At A Penalty Hearing 3

3. Dawson's Membership in a "White Racist Prison Gang" Was Not Relevant "Character" Evidence 8

4. The State's Introduction of the Aryan Brotherhood Evidence Clearly Contravened the First Amendment 12

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Barclay v. Florida, 463 U.S. 939 (1983) 14, 16, 17

Brown v. Board of Education, 347 U.S. 483 (1954) 16

California v. Brown, 479 U.S. 538 (1987) 17

Collin v. Smith, 578 F.2d 1197 (7 Cir. 1978) 12, 13

Dawson v. State, 581 A.2d 1078 (Del. 1990) 2, 3

Flamer v. State, 490 A.2d 104 (Del. 1983) 2, 3

Franklin v. Lynaugh, 487 U.S. 164 (1988) 5, 7, 8, 9

Furman v. Georgia, 408 U.S. 238 (1972) 13, 16

Gebhart v. Belton, 91 A.2d 137 (Del. 1952) 15

Lockett v. Ohio, 438 U.S. 586 (1978) 4

McKoy v. North Carolina, 108 L. Ed 2d 369 (1990) 4

Riley v. State, 492 A.2d 997 (Del. 1985) 3

Texas v. Brown, 105 L.Ed.2d 342 (1989) 14

United State v. Abel, 469 U.S. 45 (1984) 6

United State v. Bakker, 4th Cir., No. 89-5687, 2/11/91, ___ LW ___, 48 Cr.L. 1472 10

United States v. Lemon, 723 F.2d 922 (D.C. Cir. 1983) . . . 6, 16

Whalen v. State, 492 A.2d 552 (Del. 1985) 2

Woodson v. North Carolina, 428 U.S. 304 (1976) 5

Zant v. Stephens, 462 U.S. 862 (1983) . . . . . passim

UNITED STATES CONSTITUTION

First Amendment . . . . . passim

Eight Amendment . . . . . passim

Fourteenth Amendment . . . . . passim

STATUTES

11 Del. C. § 4209 6

OTHER AUTHORITIES

Oliver Wendell Holmes, The Common Law, 1881 11

No. 90-6704

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

DAVID F. DAWSON,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

ON **PETITION FOR A WRIT OF CERTIORARI**
TO THE SUPREME COURT OF THE STATE OF DELAWARE

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Several general observations should preliminarily be made on the petitioner's behalf prior to directly addressing Delaware's legal arguments in its brief in opposition. First, the trial court did not provide any explanatory instruction as to any limiting consideration the jury should give to the evidence of the defendant's beliefs or membership in the Aryan Brotherhood. Second, the Supreme Court of Delaware found that the evidence concerning the defendant's beliefs in and membership in the Aryan Brotherhood were admissible evidence of the defendant's character in the death penalty proceeding. Res. Br. at 12. Third, under these circumstances, the Court did not find that the First Amendment barred the use of these views at the petitioner's death penalty hearing.

1. Delaware's Capital Sentencing Statute

In its brief in opposition, the State of Delaware argues that, under its death penalty statute, a defendant is "presumptively subject to the sentence of death" whenever at least one of the statutory aggravating circumstances has been established, Resp. Br. at 17.

Delaware does not have a "presumptive" death penalty statute. Delaware's statute vests the jury with the widest discretion in their decision concerning imposing a sentence of death. The statute is not a "weighing" statute because the jury is not told how to weigh and consider aggravating and mitigating circumstances. Flamer v. State, Del. Supr., 490 A.2d 104, 135 (1983) (citing Zant v. Stephens, 462 U.S. 862 (1983)). The trial court must convey in its instructions to the jury that they still may recommend against the death penalty no matter what aggravating circumstances are found to exist. Dawson v. State, Del. Supr., 581 A.2d 1078, 1104-05 (1990); Whalen v. State, Del. Supr., 492 A.2d 552, 560-62 (1985).

Moreover, besides constitutional limitations which might prevail against any "presumptive" death penalty statute, common sense ordains that there cannot be any "factual" presumption that the death penalty will be imposed in Delaware because juries have in fact declined to imposed the death penalty in about 85% of the cases since 1977 where a death penalty hearing premised on at least

one statutory aggravating circumstance has been conducted.[1]

Consequently, the role of the non-statutory aggravating circumstance in question would have more significance to the jury's discretionary decision that death should be imposed, not less significance as Delaware apparently suggests by its misleading argument about Delaware's "presumptive" death penalty.

2. Role of Aggravating "Character" Evidence At A Penalty Hearing

Delaware's Attorney General basically contends that the scope of relevant character evidence is unfettered with respect to protected expression when used by the State as a non-statutory aggravating circumstance at the discretionary stage of a capital sentencing proceeding. Specifically, Delaware argues that there is not "a narrower test of relevancy when the evidence is being proffered by the prosecution as an 'aggravating factor' rather than by the defendant in 'mitigation.'" Resp. Br. at 19. It offers no applicable precedential authority for this unconventional argument.

In fact, this argument was augured in Lockett where this Court expressed the view that:

> ...the Eighth and Fourteenth Amendments require that the sentencer....not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

---

[1] In the petitioner's case, the Delaware Supreme Court found that Dawson was one of only three first degree murder defendants of the twenty six who have gone to a penalty hearing since 1985 upon whom the jury imposed the death sentence. Dawson v. State, Del. Supr., 581 A.2d 1078, 1109-11 (1990) (A-69-71). See also, Riley v. State, Del. Supr., 496 A.2d 997, 1026-1028 (1985); Flamer v. State, Del. Supr., 490 A.2d 104, 138-144 (1983).

Lockett v. Ohio, 438 U.S. 586, 604 (1978). (emphasis in original). In arriving at this broad ruling, ("any aspect of a defendant's character"), governing only mitigating evidence, the Court limited the admission of general character evidence to that: 1) proffered by a defendant, 2) as a mitigating factor, 3) in support of a penalty less than death. In contrast, the general "character" evidence offered by the State below concerning the petitioner's Aryan Brotherhood membership was: 1) proffered by the prosecution, 2) as an aggravating circumstance, 3) in support of the death penalty.

Delaware has chosen to ignore this Court's repeated caveat that:

> In contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence.

McKoy v. North Carolina, 494 U.S. ___; 108 L. Ed 2d 369; 110 S. Ct.___ (1990). (citations omitted).

The petitioner, of course, agrees with Delaware that a state's introduction of relevant aggravating character evidence, although not denominated as a statutory aggravating factor, at a penalty hearing does not violate the Eighth Amendment. Zant v. Stephens, 462 U.S. 862 (1983). Res. Br. at 19. For example, in the case below, the petitioner's criminal record and correctional record, although non-statutory aggravating evidence, were properly introduced as character evidence by the State of Delaware at his penalty hearing without defense objection. This court recognizes

such evidence as relevant evidence of the defendant's character. Franklin v. Lynaugh, 487 U.S. 164, 178 (1988) ("...the jury was surely free to weigh and evaluate petitioner's disciplinary record as it bore on his 'character' -that is, his 'character' as measured by his likely future behavior."). What the petitioner vigorously disputes is Delaware's dangerous proposition that it may introduce any general "character" evidence at a penalty hearing which is legally irrelevant to the issue of whether a human being should be executed.

Ironically, the State of Delaware's logic and its application of prior decisions of this Court are so contorted that the State essentially argues that the "fundamental respect for humanity underlying the Eighth Amendment" requires that the State be permitted to use evidence of belief ordinarily protected by the First Amendment to argue to a jury that the holder of such a belief does not deserve to live. Res. Br. at 19 (citing Woodson v. North Carolina, 428 U.S. 304 (1976)). Only the petitioner had any Eighth Amendment right at stake, however. The Eighth Amendment, like the First Amendment, serves exclusively to curb governmental conduct. Therefore, under no circumstances can the "fundamental respect for humanity underlying the Eighth Amendment," which Delaware disingenuously espouses, authorize the punishment of a capital defendant for beliefs or associations protected by the First Amendment.

Delaware also argues that evidence of the petitioner's belief or membership in the Aryan Brotherhood was relevant because "its

value [wa]s to negate the existence of circumstances that otherwise might plausibly be offered as mitigating factors." Resp. Br. at 19. (emphasis added). This argument suggests that the prosecution was required to anticipate through mere speculation what mitigating factors the defense might introduce. This was not the case. Delaware law required the petitioner to give written notice to the State of the mitigating factors he would offer prior to the commencement of the penalty hearing. 11 Del. C. 4209(c).

The State also argues that any evidence is "relevant" at this stage if it is used to "negate" the existence of mitigating evidence. Res. Br. at 19. Obviously, the State avoids using the legal term "rebut" in the context of this argument because use of that term implies that such evidence must be legally and logically relevant as a threshold consideration. On the other hand, to "negate" a mitigating case tending to prove that a defendant is less deserving of death, requires only the presentation of any evidence which might cause the jury to dislike the defendant because the evidence is "negative". Neither the Eighth nor the First Amendments permit a negative, "we don't like him" test which the State of Delaware would have this Court accept in order to determine whether such "negative" evidence is relevant to a defendant's character in a death penalty hearing. United States v. Abel, 469 U.S. 45 (1984); United States v. Lemon, 723 F.2d 922 (D.C. Cir. 1983). Because Delaware cannot legitimately explain how any of the mitigating factors identified by the petitioner prior to the penalty hearing could have been logically rebutted by the

petitioner's Aryan Brotherhood beliefs or membership in the correct legal sense of the term "rebut", Delaware's argument in this regard must be rejected as pretextual or revisionist at best.

The State of Delaware also mentions several features of its death penalty law which reflect the very wide-range of discretion vested in capital sentencing juries. For instance, the jury has the power to grant mercy and can decline in its "unconstrained and absolute" discretion to impose the death penalty regardless of the circumstances. Resp. Br. at 17-18, n.6. Furthermore, "under the Delaware statute, the sentencing jury is not given any instructions about the weight of any 'aggravating' and 'mitigating' circumstances or how to perform the 'weighing' process." Id. Inherent in such a wide range of sentencing discretion is the likelihood that the discretion exercised by a defendant's jury will be improperly influenced by the introduction of evidence which is irrelevant to the capital sentencing process, and that the jury's decision to impose the death sentence will be arbitrary and in violation of the Eighth and Fourteenth Amendments.

Notwithstanding Delaware's incredulous argument, unsupported by any direct authority, concerning the nearly unfettered discretion accorded to a jury under its death penalty statute, this Court has observed on numerous occasions that:

> Our cases before and since have similarly suggested that "sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses" and that the "Constitution ... requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." Franklin v. Lynaugh, 487 U.S. 164, 181 (1988) (citing California v. Brown, 479 U.S 538,

541 (1987).

If sentencers may not be given unbridled discretion under the Eighth amendment in their decision to impose the punishment of death, to the extent that discretion must be limited, it cannot be applied in order to punish constitutionally protected expression.

3. Dawson's Membership in a "White Racist Prison" Gang Was Not Relevant "Character" Evidence.

Although Delaware admits that this Court has never defined character evidence in the manner in which it would now have it defined, Res. Br. at 20, every case which Delaware offers as authority for its argument is a mitigation case which permits a wide range of character evidence as mitigation to be submitted to the jury on a defendant's behalf. Moreover, in Franklin v. Lynaugh, a very recent mitigation case relied upon by the State of Delaware, it was observed that,

> this Court has gone far in establishing a constitutional entitlement of capital defendants to appeal for leniency in the exercise of the juries' sentencing discretion. [citations omitted] But even in so doing, this Court has never held that jury discretion must be unlimited or unguided.

Franklin v. Lynaugh, 487 U.S. 164 (1988) (plurality opinion).

Using Franklin, id., a mitigation case, Delaware argues that Dawson's membership in the Aryan Brotherhood was relevant character evidence for capital sentencing purposes because it told the jury "something" about Dawson's personality. Resp Br. at 20-21. ("the catchwords 'character' and 'background' are now taken to encompass any evidence which 'tells the sentencer something about the

defendant's personality.'")[2] Any evidence perhaps indicative of a person's personality or background, however, need not be admissible "character" evidence. But to be relevant and admissible, character evidence proffered by the prosecution cannot merely tell the sentencer something about the defendant: it must be probative on the question of whether this defendant should die. For example, regular church attendance is mentioned as a type of mitigating "character" evidence in Franklin v. Lynaugh, id. at 190. If the State's dialectical premise is valid, that "it must be 'relevant' for the sentencing jury to hear evidence, offered by the prosecution, that the defendant lacks counter-balancing redeeming qualities," Res. Br. at 21, then it would be relevant for the State to offer evidence that the defendant does not attend church or does not believe in God in order to counterbalance any mitigating evidence which would make it less likely that the jury would impose death.[3] Any such evidence, despite Delaware's nearly boundless view of what character evidence would be "consistent with [a defendant's] evil character," Res. Br. at 21, has never conformed to constitutional requirements, however. As one court

---

[2] citing the dissenting opinion of Justice Stevens in Franklin v. Lynaugh,487 U.S. 164, 190 (1988) (plurality opinion).

[3] The petitioner raised this point previously, cert. pet. at 21, and Delaware did nothing to disavow it in its brief in opposition. Obviously, the State of Delaware may believe, consistent with its "anything goes" analysis with respect to the admission of character evidence at a death penalty hearing, that they may both argue and offer evidence of a defendant's lack of "counter-balancing redeeming" religious beliefs of even peculiar religious beliefs which do not have the approval of a "broad community consensus." Res. Br. at 28.

most recently observed:

> Sentencing discretion, however, must be exercised within the boundaries of due process ... Courts have held that sentences imposed on the basis of impermissible considerations, such as a defendant's race or national origin, violate due process ... While these cases focused on a defendant's characteristics, we believe that similar principles apply when a judge impermissibly takes on his own religious characteristics into account in sentencing.

United States v. Bakker, 4th Cir., No. 89-5687, 2/11/91, ___ LW ___, 48 CrL 1472.

The State portrayed the petitioner as being of "evil character" to have the jury dislike him as a result of holding beliefs protected by the First Amendment and in retrospect portrays this effort as "counter-balancing." But this effort was not permitted to the State under the Eighth Amendment. It is unequivocal that Delaware may not attach the "'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example race, religion, or political affiliation of the defendant." Zant v. Stephens, 462, U.S. 862, 885 (1983). This was also not a case where the State sought to logically discredit or rebut a defendant's affirmative contention that he was a member of the NAACP or B'nai B'rith or the N.C.C.J. and supported these organizations in their work over the years, by attempting to discredit the witness by questioning him about his alleged beliefs and inconsistent membership in the Aryan Brotherhood.

In addition, Dawson did nothing unlawful in conjunction with

his membership in the Aryan Brotherhood.[4] But Delaware argues that Dawson's membership in the Aryan Brotherhood is relevant character evidence because it demonstrates that he "lacks counter-balancing redeeming qualities" and that his murder of Marie Kisner "was consistent with his evil character" revealed by such beliefs. Resp Br. at 21. This misdirected argument should be rejected on the record. Not only has the State conceded at all times that the murder committed by the petitioner was not racially or religiously motivated but Delaware's prosecutors also conceded that, while they had information of other groups calling similarly calling themselves the Aryan Brotherhood, they had no knowledge whatsoever concerning the group to which Dawson allegedly belonged:

> PROSECUTOR: ....He can't tell us what Delaware Aryan Brothers believe in except to the extent that Delaware Aryan Brothers sort of per force must have the same general--
>
> THE COURT: What is it again he would testify they would believe in?
>
> PROSECUTOR: That's where my proffer starts to get thin, Your Honor, because I only talked to him for about 15 minutes.

(A-91).

Clearly, the state of Delaware has failed to articulate a valid legal basis to support the conclusion that Dawson's membership in the Aryan Brotherhood could have been relevant to the issue of whether he was to live or die. Therefore, Delaware's claim that the Eighth Amendment was not transgressed by the

---

[4] A man may have as bad a heart as he chooses, if his conduct is within the rules. Oliver Wendell Holmes, The Common Law, 1881.

introduction of Dawson's association with the Aryan Brotherhood, Resp. Br. at 23, must be rejected.

4. The State's Introduction of the Aryan Brotherhood Evidence Clearly Contravened the First Amendment.

Delaware's claim, without ornamentation, is that, among other factors, Dawson can be put to death for constitutionally protected racist beliefs or membership in the Aryan Brotherhood. However, the State of Delaware is completely unable to extend the petitioner's membership in the Aryan Brotherhood beyond the sphere of ideology and it cannot identify a single illegal or immoral act committed by Dawson in connection with his constitutionally protected membership in the Aryan Brotherhood.

Delaware also argues that its prosecutors could exhort members of the petitioner's jury to weigh his membership in the Aryan Brotherhood as an aggravating factor to tilt the balance towards death when deciding its "reasoned moral response to the defendant's background, character and crime". Resp. Br. at 15, (citations omitted). The State of Delaware claims that it may raise a defendant's membership in a racist group as an aggravating factor in a capital sentencing hearing because a state "need not endorse those who hold [racist] views." Resp. Br. at 28. (citing Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978)). Delaware's attempt to draw a distinction between punishing people as a result of beliefs protected by the First Amendment and not endorsing those who hold such views is, however, an outstanding example of Orwellian double-

speak.[5]

To sanction a capital jury's use of a "we don't like him" standard in making its decision is to forget the lessons of Furman v. Georgia, 408 U.S. 238 (1972). Furthermore, although mentioned by the State as authority, Collin squarely rejects Delaware's position in the plainest of terms:

> The result we have reached is dictated by the fundamental proposition that if [First Amendment] rights are to remain vital for all, they must protect, not only those whom society deems acceptable, but also those whose ideas it quite justifiably rejects and despises.

Collin v Smith, 578 F2d at 1210.

Additionally, Delaware advances the argument that "Dawson's First Amendment thrust misses its mark" because Dawson's constitutionally protected membership was not used to establish his eligibility for consideration of the death penalty, ("channeling phase"), but merely to persuade the jury that it should in fact impose the death penalty, ("discretionary" phase). Resp. Br. at 24.[6] Specifically, Delaware argues that "the traditional First

---

[5] In such an environment, state representative David Duke could be denied a place on the Louisiana ballot, not because the Board of Elections wanted to punish him because of his views about or association with the Ku Klux Klan, but because the Board of Elections did not want to endorse either him or his views as a result of their moral response to those views.

[6] In this respect the State of Delaware not only distorts but turns inside out the meaning of Zant v. Stephens, 462 U.S. 862 (1983). If Delaware's interpretation of Zant is correct, the State of Delaware, although it cannot use such evidence to establish statutory aggravating factors, may permissibly argue to a jury that in their discretion, members of the Communist party or individuals who have burned the United States flag are more deserving of death. The State, in its brief in opposition, made no attempt to disclaim the petitioner's observation, Pet. Cert. at 16, f.7, which raised the question of whether the State could permissibly argue that a

Amendment restraints against governmental viewpoint discrimination are not applicable when a capital sentencing jury is called upon to make the 'reasoned moral response' whether an 'individual has lost his moral entitlement to live." Res. Br. at 27-28. Not only has this Court never arrived at such a determination, it has plainly indicated that such a distinction would be unequivocally rejected. Race, religion, or political affiliations are constitutionally irrelevant factors to the sentencing process, no matter what "aggravating" label a State chooses to attach to such factors in its death sentencing process. Zant v. Stephens, 462 U.S. 862, 885 (1983). Delaware further urges that:

> "a capital sentencing scheme need not be so 'value' or 'content' neutral at the stage where the jury is called upon to determine whether to forego retribution and exercise leniency or mercy."

Resp. Br. at 24-25. Delaware's insistence that a state need not be so "value" or "content" neutral at the point where the decision of life versus death is made also plainly distorts this Court's decision in Barclay v. Florida, 463 U.S. 939 (1983). In Barclay, this Court sanctioned a sentencer's consideration of the fact that a black defendant's indiscriminate murder of a white victim was

---

flag burner later convicted of capital murder was more deserving of death because of such "character" evidence. See Texas v. Brown, 491 U.S. ___, 105 L.Ed 342, 109 S.Ct. ___ (1989).

[7] Again, Delaware confuses the issue. A capital jury is not "called upon to determine whether to forego retribution and exercise leniency or mercy." Rather, it is called upon to determine whether death is the only appropriate penalty. The penalty of life imprisonment with possibility of probation, parole or sentence reduction is the most retributive sentence available short of the death penalty. Retribution is never "foregone."

motivated by racial hatred and his desire to instigate a race war. Id. at 949 ("The United States Constitution does not prohibit a trial judge from taking into account the elements of racial hatred in this murder.") However, the Barclay Court did not find that a defendant's general beliefs in racial separatism or racial superiority in and of themselves could serve as an aggravating circumstance as the state of Delaware misleadingly suggests. Res. Br. at 25-26.

In addition, Delaware does not disavow the position articulated by its prosecutor in support of the position that the evidence was admissible:

> What is important for the jury to understand is what he is into. This is his character. His character is he thinks the Aryan Brotherhood is a really neat organization and he believes in the things that they believe in.

(A-85,86) and that some of the literature seized from petitioner's cell "deal[t] with kinds of white supremacy as religion." (A-84). Delaware's designation of the petitioner's membership in the Aryan Brotherhood as an aggravating circumstance, its presentation of that evidence to petitioner's jury and the exhortation by its prosecutor that such membership was a reason to vote to impose the death penalty constituted state action violative of Dawson's First and Eighth Amendment rights.[8]

---

[8] Delaware's continued unwillingness to remain race neutral in some policies may be viewed in an ironic historical context. Nearly forty years ago, Delaware, through its Attorney General, asked for relief in this Court from an order of its own Supreme Court ordering desegregation on equal protection grounds in several racially segregated "separate but equal" unequal school districts. Gebhart v. Belton, Del. Supr., 91 A.2d 137 (1952), modified sub.

The thrust of State of Delaware's arguments, that, so long as a narrowing statutory aggravating factor also exists, the "communal sense of tolerance" and "communal moral voice" permit the jury virtually unlimited discretion to sentence the petitioner pursuant to its "reasoned moral response" based on values in which there is "broad community consensus," Res. Br. at 27-28, is not supported by any authority. Were it so, the State could importune cultural fears of miscegenation, or fears of unorthodox religious sects and peculiar political parties possessed by many jury members, and based on a "communal moral voice," ask the jury to impose death based on those values.

Throughout its arguments, the State ignores the fundamental proposition that a jury's discretion in the capital sentencing process is abused whenever it is exercised for reasons incompatible with the United States Constitution. Furman v. Georgia, 408 U.S. 238 (1972).

Conclusion

Delaware's claim that "one need not look any further than the various opinions in Zant v. Stephens, 462 U.S. 862 (1983) and Barclay v. Florida, 463 U.S. 939 (1983) to turn back [Dawson's] petition", Resp. Br. at 16, must be rejected. Barclay sanctions a

---

nom., Brown v. Board of Education, 347 U.S. 483 (1954). Of course, if Delaware is presently race neutral in its death policy, it would consider, and obviously does not reject in its brief in opposition, that membership in the "Black Hebrews" or other prison racial sects would similarly constitute "character" evidence probative in a death penalty proceeding of whether that individual defendant should die. Cf. United States v. Lemon, 723 F.2d 922 (D.C. Cir. 1983).

jury's consideration of racial hatred which itself motivated the murder; in no way does Barclay authorize admission of evidence concerning a defendant's constitutionally protected activity and membership. The clear teaching of Zant is that petitioner's death sentence is constitutionally infirm because the jury was permitted at the sentencing stage "to draw adverse inferences from conduct that is constitutionally protected." Zant, supra at 885.

For these reasons, the petitioner, DAVID DAWSON, prays that this Court grant his petition for a writ of certiorari to review the judgment of the Delaware Supreme Court affirming his sentence of death.

Respectfully submitted,

BERNARD J. O'DONNELL, ESQUIRE
Counsel of Record

BRIAN J. BARTLEY, ESQUIRE

Office of the Public Defender
820 N. French St.
Wilmington, DE 19805
(302) 577-3230

Date: March 25, 1991

IN THE SUPREME COURT OF THE UNITED STATES

DAVID F. DAWSON, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.	)	No. 90-6704

AFFIDAVIT OF MAILING

STATE OF DELAWARE)
) SS.
COUNTY OF NEW CASTLE)

BE IT REMEMBERED that on this 25th day of March, 1991, personally appeared before me, a Notary Public for the State and County aforesaid, Michell L. D'Arcangelo, a legal Secretary for the Public Defender's Office, of the State of Delaware who being personally known to me, did swear and depose that she caused to be placed in the United State's Mail two copies of Petitioner's Reply To Brief In Opposition to the following attorneys:

Gary A. Myers, Esquire
Department of Justice
1 S. Race Street
P.O. Box 508
Georgetown, Delaware 19947

Michell L. D'Arcangelo
MICHELL L. D'ARCANGELO

SWORN TO AND SUBSCRIBED before me the day and year aforesaid.

Brian J. Bartley
ATTORNEY-AT-LAW

No. 90-6704

FILED
APR 30 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

DAVID F. DAWSON,

Petitioner,

vs.

DELAWARE,

Respondent.

On Writ Of Certiorari To The Delaware Supreme Court

JOINT APPENDIX

LAWRENCE M. SULLIVAN
Public Defender of
the State of Delaware

BERNARD J. O'DONNELL*
Assistant Public Defender

BRIAN J. BARTLEY
Assistant Public Defender

Office of Public Defender
Fifth Floor
820 N. French Street
Wilmington, DE 19801
(302) 577-3230

Counsel for Petitioner

*Counsel of Record

CHARLES M. OBERLY, III
Attorney General of
the State of Delaware

RICHARD E. FAIRBANKS, JR.
Chief of Appeals Division

GARY A. MYERS*
Deputy Attorney General

LOREN C. MEYERS
Deputy Attorney General

Delaware Department of
Justice
1 South Race Street
P.O. Box 508
Georgetown, DE 19947
(302) 856-5353

Counsel for Respondent

Petition For Certiorari Filed January 2, 1991
Certiorari Granted April 1, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Motion In Limine 2

Excerpts from April 8, 1988 hearing on Motion in limine 4

Letter to trial court renewing request for pretrial ruling on motion in limine 6

Excerpts from June 2, 1988 office conference 8

Excerpts from June 6, 1988 office conference 19

Excerpts from jury selection 26

Excerpts from sidebar conference prior to announcement of guilty verdict 29

Excerpts from June 24, 1988 office conference 32

Excerpts of June 27, 1988 colloquy between trial court and counsel prior to commencement of penalty hearing 54

State's Opening Statement at penalty hearing 59

Petitioner's waiver of Opening Statement at penalty hearing 64

Excerpts of testimony at penalty hearing 65

a. Ms. Guessford 65

b. Detective Huttie 82

c. Ms. Hickman 88

d. Ms. Lintz 91

State's Closing Argument at penalty hearing 96

TABLE OF CONTENTS – Continued

Page

Petitioner's Closing Argument at penalty hearing .. 111

State's Rebuttal Argument at penalty hearing 123

Excerpts of jury instructions after penalty hearing 131

Introduction of Stipulation concerning Aryan Brotherhood..... 132

Excerpts from trial judge's penalty hearing report.. 133

Opinion of the Delaware Supreme Court dated October 4, 1988..... 135

Order of the Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis, April 1, 1991 210

RELEVANT DOCKET ENTRIES

January 5, 1987	Indictment of Petitioner
March 25, 1988	Motion In Limine filed
April 8, 1988	Presentation of Motion In Limine
May 25, 1988	Defense counsel's letter to trial court
June 2, 1988	Pretrial conference
June 6, 1988	Commencement of jury selection
June 13, 1988	Commencement of trial
June 24, 1988	Return of guilty verdict
June 27, 1988	Commencement of penalty hearing
June 28, 1988	Return of death verdict
July 22, 1988	Imposition of death sentence
October 4, 1990	Opinion by Delaware Supreme Court
October 18, 1990	Mandate from Delaware Supreme Court

IN THE SUPERIOR COURT OF THE
STATE OF DELAWARE
IN AND FOR KENT COUNTY

DELAWARE,

Plaintiff

V.

DAVID F. DAWSON,

Defendant

Case No.: IK-86-12-0024 and
IK-87-01-0834 through
IK-87-01-0847

MOTION IN LIMINE

* * *

COMES NOW, the defendant, David F. Dawson, by and through his attorney, Paul S. Swierzbinski, Esquire, who respectfully moves that This Honorable Court, pursuant to D.R.E. 103(c), enter and Order excluding certain evidence which the defendant believes that the State will attempt to introduce at trial, such evidence being both inadmissible and highly prejudicial. The evidence which defendant seeks to exclude is as follows:

* * *

3. Pursuant to D.R.E. 402 and 403, to prevent the State from forcing defendant to exhibit any tatoos [sic] that he may have before the jury.

4. Pursuant to D.R.E. 402 and 403, all oral testimony of any State's witness as to defendant's alleged membership in an organization known as the Arian Brotherhood.

* * *

WHEREFORE, defendant prays that the Court enter the attached Order.

PAUL S. SWIERZBINSKI,
ESQUIRE
Assistant Public Defender

IN THE SUPERIOR COURT OF THE
STATE OF DELAWARE
IN AND FOR KENT COUNTY

[Caption Omitted In Printing]

TRANSCRIPT OF PRE-TRIAL MOTIONS: APRIL 8, 1988

* * *

[16] MR. SWIERZBINSKI: Thank you, Your Honor.

Your Honor, concerning the motion in limine. I believe that is fairly straightforward, and I would request the Court sign the order unless Mr. Wharton has some objection to that.

MR. WHARTON: Yes, Your Honor, I do. First of all, I guess we could go serially through the different parts of the motion. I understand the purpose of a motion in limine is to [17] get pretrial rulings on certain things; however, sometimes I think it is necessary in order to make a judgment as to the probative value of certain evidence or the prejudicial effect of certain evidence, the Court needs to have a context in which the evidence is being offered.

Subparagraph four deals with a membership in a group known as the Aryan Brotherhood. Once again, it may or may not be relevant during the course of the trial and/or any [18] penalty hearing which might occur to bear on, one, his motive in committing the crime or, two, the character and propensities. I think once again we have to view that information in the context of the trial itself

* * *

I think it's inappropriate at this time to [19] attempt without a hearing any of the evidence to preclude the State from a particular argument at trial or after the completion of the evidence.

* * *

THE COURT: Mr. Swierzbinski.

MR. SWIERZBINSKI: In terms of the State's comment concerning the Aryan Brotherhood, the State refers to perhaps a penalty hearing. The Court has clearly ruled that the Rules of Evidence for a penalty hearing are different from those at trial. Once again, [20] there is no necessity for the State to introduce evidence of my client's alleged memebership [sic] in such an organization at the trial, other than to inflame the jury against him, and I would respectfully suggest the Court does have the authority and should instruct the State that it should not introduce pictures that we referred to or his membership in this organization.

* * *

[22] THE COURT: I have considered the argument of counsel and the motion in limine. It is ordered that the objection shall be considered in the context at trial itself. The State shall not elicit the evidence objected to without prior notice of defense counsel and the Court.

May 25, 1988

* * *

Dear Judge Ridgely:

After reviewing the State's Request for Voir Dire Questions that I received yesterday, Defendant does not object to pages 1 through 5 inclusive (ending with the phrase" [sic] "jurors are selected") except as modified by my letter to the Court dated May 16, 1988, and enclosed herewith. Also enclosed please find a clocked-in copy of Defendant's Request for Voir Dire Questions, Questions To Individual Jurors.

Defendant respectfully requests that the Court reconsider its ruling on April 8, 1988 on the Motion In Limine, § 4 concerning Defendant's alleged membership in the Arian Brotherhood. Once again, Defendant takes the position that no useful purpose can be served by permitting the State to introduce such evidence other than to prejudice the Defendant by inflaming the jury. Such evidence has, at the minimum, racial and religious overtones. If the Court follows its present ruling, I as counsel for Defendant must assume for the sake of jury selection that such evidence will be admitted at trial, thereby causing me to strike potential jurors who would otherwise be acceptable to the Defendant. Obviously, I will be forced to use up twenty (20) peremptory challenges in quick succession. (Your Honor will note that Your Honor has already denied my Motion for Additional Peremptory Challenges subject to renewal at jury selection.) For this reason, I request that the Court direct the State to make an Offer of Proof at the office conference scheduled for June 2, 1988 as to what evidence it intends to offer on the

issue of the Arian Brotherhood. If the Court rules at that time, I will be able to make an intelligent decision in terms of jury selection. The alternative to the Court's ruling next week would be to submit

* * *

Voir Dire questions on this issue itself, but the problem is that the cure is as bad as the disease. If appropriate questions are propounded on Voir Dire, the jurors, if they are paying any attention whatsoever, will know that the alleged member of the Arian Brotherhood is the Defendant.

By separate letter, I am notifying the Court of Defendant's witnesses.

Finally, this is in response to Mr. Wharton's letter of May 19, 1988 that I received today. Please be advised that Mr. James has not issued a written report.

I thank the Court in advance for its anticipated cooperation.

Respectfully yours,

/s/ Paul S. Swierzbinski
PAUL S. SWIERZBINSKI,
ESQUIRE
Assistant Public Defender.

* * *

IN THE SUPERIOR COURT OF
THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

[Caption Omitted In Printing]

TRANSCRIPT OF THURSDAY, JUNE, 2, 1988
OFFICE CONFERENCE

---

* * *

[30] MR. SWIERZBINSKI: Your Honor, 20 and 21 refer to what I wrote Your Honor concerning the Aryan Brotherhood in the letter of last week the 25th. It might be appropriate to discuss that at this time in relation to these questions if Your Honor would like to do that. I will do whatever Your Honor wants to do.

THE COURT: You may say anything necessary in support of your application for Question 20 to be asked.

MR. SWIERZBINSKI: I made my comments in light of my letter last week to Your Honor wherein I requested that Your Honor reconsider your position as indicated by Your Honor's order at pretrial motions when Your Honor said Your Honor would make no ruling on the motion in limine concerning the issue of the Aryan Brotherhood prior to trial.

The problem we have is that if the State introduces evidence concerning my client's membership or alleged membership in the Aryan Brotherhood that basically is going to the issue of race, religion, et cetera and if that comes out in the trial that is highly prejudicial, highly inflammatory and has no relevance to whether or not he killed Mrs. Kisner.

If the State is to convict him of killing [31] Mrs. Kisner, our position is so be it, let them do it on the evidence that they have. They shouldn't be able to introduce racial or religious prejudice.

THE COURT: What is the Aryan Brotherhood?

MR. SWIERZBINSKI: I guess, Your Honor, it is definitional, but the definition as I understand it from speaking to my investigators who I would indicate are former police officers it is an organization of, I guess, mostly inmates at different institutions incarcerated in this country. I guess it is not only inmates, but most of it is inmates who are basically white who are against blacks, who are against Jews and perhaps against other religions, races, but it is particularly against blacks and Jews and my position is if the State intends to introduce that just an offer of proof just before they do that that is certainly better than blind siding us and giving us no notice whatsoever.

Your Honor said they had to give us notice at side bar first which I appreciate, but if the State is going to introduce evidence concerning the Aryan Brotherhood and let's say for instance they introduce evidence that because my client may or may not be a member of that organization he is against blacks and Jews. If I have blacks [32] and Jews sitting on the jury, I have a real problem. That is going to cause me ahead of time to strike these people in the ordinary jury selection process. So I believe that is an issue that has to be dealt with ahead of time.

That is why I asked Your Honor to make the State give us an offer of proof. If the State says they are not

going to introduce evidence of the Aryan Brotherhood, that is fine and we don't need Question 21, we don't need Question 20, but if they are going to a week into the trial try to bring that in I think we are certainly entitled to know answers to those two questions at this time and ask those questions to the jury panel.

THE COURT: Does the State agree with Mr. Swierzbinski's definition of the Aryan Brotherhood?

MR. WHARTON: Essentially yes. It is a prison organization. I don't know that it has affiliated chapters outside of correctional facilities.

MR. SWIERZBINSKI: I am not an expert on the Aryan Brotherhood, but I am telling Your Honor what I have heard about it.

MR. WHARTON: It is essentially a prison organization and it probably differs from one institution to another in its makeup, but its general themes are white [33] supremacy and also some affiliation with Nazi beliefs to the extent it reflects prejudice against Jews. The defendant in this particular case –

THE COURT: Jews and blacks or just Jews?

MR. WHARTON: Jews and blacks. In this particular case, the defendant has tattooed on his, I think, back of his right hand a tattoo that says Aryan Brotherhood. So I have a reasonable suspicion he is affiliated with that group. It is not the type of group that would allow them to wear their insignia, as it were, without their permission.

THE COURT: Is it just the words or is it some insignia?

MR. WHARTON: It is a little bigger than just words. There is a type of – I can't recall technically what it depicts, but there is – on the top it says Aryan and underneath it says Brotherhood and there is something in between which I don't recall the makeup of it.

At any rate, as far as the motion in limine is concerned, I don't know at this point whether that affiliation of the defendant to the Aryan Brotherhood would have any relevance at a guilt phase. I think it would depend a lot on some of the twists that a trial may take; however, I think if we get to a penalty phase and we are talking about [34] the character and propensities of someone for whom the death penalty may be imposed I think then someone who subscribes to racial and religious hatred that clearly reflects on his character and propensities and in my estimate obviously is relevant for making the determination as to whether or not the death penalty ought to be imposed.

If he advocates racial and religious bigotry and supports those himself, I think that definitely reflects on his character and his propensities and that is one of the things that is relevant to the jury. So it may or may not be relevant at the guilt phase depending on how the trial comes up, but it is very definitely relevant in the penalty phase.

MR. SWIERZBINSKI: Your Honor, I couldn't object more. We are trying David Dawson because he supposedly killed Madeline Kisner, not because he is a Nazi, and if he has beliefs – let's assume he doesn't like black people; let's assume he doesn't like Jews. So what?

Do we exterminate people because they don't like someone?

If the jury says that he didn't kill Kisner or anybody else, so what? He has a right – he doesn't have to like people and it certainly should not been considered by the jury that we exterminate these people because we don't like his beliefs. I think his beliefs are constitutionally [35] protected. We don't have to like people, but to introduce evidence that he has Nazi beliefs what relevance does that have?

If the State wants to put this man to death, the statute says they can introduce his entire criminal record and I am not going to beat around the bush. I have seen his record; it is a bad record. But if the jury finds him guilty, they are going to have enough bad evidence in because of the trial. They will get his record in which I can't object to assuming they can prove it which I assume they will be able to. Why do they have to indicate to the jury that he doesn't like blacks, he doesn't like Jews? What relevance does that have in terms of a penalty?

THE COURT: Would such a membership be relevant to establishing the character and propensities of the defendant should we reach a penalty phase?

MR. SWIERZBINSKI: I don't see what relevance it has whatsoever.

THE COURT: To his character and propensities?

MR. SWIERZBINSKI: Just the fact – let's assume there is a Nazi magazine that he can subscribe to or anybody who belongs to the Aryan Brotherhood can

subscribe [36] to. The fact he buys a magazine or reads a magazine that is different from advocating it. If he got on the street corner and he said we should kill all the Jews and the blacks and whatever, that is certainly different than having a belief. He might believe, Your Honor, and I might believe in God, but should we be put to death for what we believe in or for what we do?

THE COURT: Mr. Wharton, does this organization or membership in it would it establish a propensity for criminal conduct?

MR. WHARTON: Your Honor, I think – first of all, I would suggest it does, but beyond that I think really what we are talking about is, or may be talking about it at a penalty phase depends on the particular proof that the State would offer. Of course, we would make our proffer prior to getting into any of that and the Court could make its determination at that stage; however, I don't think that Mr. Swierzbinski is entitled to in essence sanitize his client to eliminate many of the bad attributes or many of the bad characteristics that he has because they are relevant to determining his character and his propensities.

THE COURT: Should a member of the Jewish Defense League be on this jury?

[37] MR. WHARTON: Well, that is a question I think that I am getting to next is if we are going to exercise for cause someone who is a Jew are we going to exercise for cause someone or excuse for cause someone who is black? Does that not in effect deny the State a fair trial of people of a cross section of the community? That is in reverse.

If they are going to set out on a conscious plan to discriminate against potential jurors on the basis of race or religion, is that not just as equally offensive as the State going in there striking every black juror when we have a black defendant?

I think those are judgments that the defendant has to make. He has to say and make a judgment call in selecting jurors would a defendant's particular beliefs about race or religion make it difficult for you to be an impartial juror. I don't know how he wants to phrase them, but I think what we ought to get to is put that in or put that out, but because he has difficulty doing it putting it in or putting it out doesn't mean the State is precluded from introducing evidence about that and he has difficulties about who he wants to use preemptory challenges is not at all whether it is admissible evidence or not.

[38] THE COURT: Mr. Swierzbinski, isn't the essence of what you are trying to get at is whether a person regardless of his own individual beliefs or race would be able to give a fair and impartial trial, serve as a fair and impartial juror to a person who happens to be a member of an organization such as you refer?

MR. SWIERZBINSKI: Your Honor, I would say it would be impossible for a person of the black race or of Jewish extraction or Jewish religion to give David Dawson a fair trial if the State brings that evidence out. The State is trying to make some, I think, nebulous distinction.

They say we probably won't get it in for the guilt phase, save it for the penalty hearing. I can't pick a jury for one phase and not the other. If they convict him, I am

stuck with those same 16 people and Your Honor is not going to excuse Juror No. 3 or No. 7 because they are black or Jewish and put the alternates in and State wouldn't agree to that anyway. So when I pick that jury I have got to know whether or not the State is going to rely on religious prejudice or racial prejudice and basically if Your Honor is going to permit them to introduce religious prejudice or racial prejudice I have no choice.

When we pick that jury, I have to strike [39] every black and every Jew that is on there and I am going to have to request that Your Honor give me additional preemptory challenges which Your Honor has already denied, but the bottom line is if Your Honor is permitting them to get racial and religious prejudice in I have to take whatever steps I have to counteract that. Now, if Your Honor says they can't introduce that, I don't intend to strike blacks; I don't intend to strike Jews.

I am going to try to exercise my challenges based on the person as we see them and how they answer the questions as propounded by Your Honor, but if Your Honor indicates they can let racial or religious prejudice in I don't have any choice and I am going to use up those 20 challenges real soon. There is no way this man is going to get a fair trial.

MR. WHARTON: I think Mr. Swierzbinski is fairly obviously engaged in a great deal of hyperbole here. I think the Court is obviously capable of insuring the defendant gets a fair trial. What he is on the horns of is a dilemna [sic] that is caused not by the State, but by his own client's character and propensities and at a penalty hearing that is something the State is entitled to get

into and if he wants to winnow out jurors who are Jews, who are blacks [40] because there may be evidence of the defendant's character and propensities, feelings of racial and religious bigotry because they would be unable to be a fair and impartial juror, I think he has to make that determination as to what type of voir dire question can come in.

And he has to be judicious in telling the jury and make a decision about how much he wants to tell the jury about his client at the guilt phase, but that is not the State's problem. That is not the Court's problem. It is a problem caused by the defendant's own background.

MR. SWIERZBINSKI: Your Honor, I would suggest when the statute talks about the character and propensities of the defendants it is talking about his criminal record and things like that. Obviously that is going to come in, like I said, assuming the State can prove it.

THE COURT: What do you mean when you say and things like that?

MR. SWIERZBINSKI: All right. He has a criminal record. I assume the State has done its homework and if the State gets a conviction I assume the State is going to have certified copies from the Prothonotary's office or whatever and say bang, we have these convictions; they [41] come in; that will come in. That is certainly evidence of bad character and I can't object to that. It certainly is –

THE COURT: Are you suggesting that the statute limits the State to only producing criminal record?

MR. SWIERZBINSKI: No, it does not, but I would suggest that the statute is not that broad that the

State can introduce racial and religious prejudice and as I get back to my initial question so what if David Dawson doesn't like blacks or he doesn't like Jews? What relevance does that have to whether or not he gets the death penalty?

MR. WHARTON: Your Honor, that is jury argument. What relevance does the fact 10 years ago he committed a misdemeanor theft have as to whether he gets the death penalty?

I think the fact he may subscribe to very radical beliefs about blacks and Jews is far more relevant to his character and propensities than a misdemeanor theft charge 10 years ago. The defendant is essentially making the jury argument and trying to cast that as an argument to exclude evidence and –

THE COURT: Obviously you do not require a voir dire question to determine the race of a prospective [42] juror. You agree with that, do you not?

MR. SWIERZBINSKI: Yes.

THE COURT: I will reserve decision regarding your application that I inquire regarding religious preference.

MR. SWIERZBINSKI: Your Honor, can I make one other point since we are making a record? I would suggest that basically what the State is suggesting is in violation of the First Amendment which says everybody has a right to free speech. Free speech has been construed by the Supreme Court to mean not only speech, but also to a person's beliefs.

David Dawson doesn't have to like certain people. None of us have to like certain people, but the fact we don't like people or we don't like things is a belief that people have and they should not been [sic] subjected to the death penalty.

I would suggest if the Court permits such beliefs to come in, as the State calls them, it is clearly in violation of the First Amendment and possibly other constitutional provisions and I would say it is so clearly out of line it is going to be almost impossible or will be impossible to pick an impartial jury.

[43] Our position, if I can just summarize, our position is if the State is going to convict him and the State is going to have the jury assess the death penalty to him, they ought to do it fair and square based on the evidence, based on the record that he has and use their persuasive powers. We have two experienced prosecutors. They are very good at what they do.

If they can convict him based on the facts and with his criminal record, I would say with their experience they certainly should be able to make a very good argument to the jury to convict him based on what has been heard by the jury. They shouldn't have to muddy up the waters by what he believes in.

THE COURT: All right. Your comments are noted.

IN THE SUPERIOR COURT OF THE
STATE OF DELAWARE
IN AND FOR KENT COUNTY

[Caption Omitted In Printing]

TRANSCRIPT OF JURY TRIAL BEGINNING MONDAY, JUNE 6, 1988

---

* * *

[A-13] That leaves us with one issue which I believe we did not resolve on Thursday at the office conference. That was the issue of Aryan Brotherhood. I believe at that time Your Honor said Your Honor would think about it over the weekend and give Your Honor's ruling on [A-14] that so we would know what we are going to be doing when we pick the jury.

* * *

[A-15] THE COURT: Counsel, as a follow-up on your representation regarding the nature of your understanding of what the Aryan Brotherhood is, I conducted an [sic] nexus search using the term brotherhood and was able to determine from wire services and other news media accounts which describe the organization that the Aryan Brotherhood is a white supremacist Nazi oriented gang which first originated in San Quentin Prison in California. It's apparent motto: Kill to get in and die to get out.

In various prisons throughout the United States this gang has a reputed violence against black and Latino prison gangs. I found no indication as to acts of violence

against particular religious groups on the part of the Aryan Brotherhood.

MR. BUTLER: Your Honor, if we could amplify our position a little bit. Mr. Swierzbinski has reiterated his concerns about the possible racial or religious undertones that may be kicked up, if you will, by references to Nazism or Aryan Brotherhood or any such references. We have maintained and continue to maintain our position that [A-16] these are all reflective of the defendant's character should we get to the penalty phase and the evidence is relevant at that point.

I just want to state for the record that with our sensitivity to Mr. Swierzbinski's perceived dilemma or problem that the jury may decide this penalty phase on something other than the evidence produced at the phase, at the penalty phase we are specifically sanctioning any questions that Mr. Swierzbinski wants to ask that probe that issue, that whatever voir dire he wants to get into that deals with that question we are amendable to.

The only voir dire posed at this time is voir dire relating to a prospective juror's religious preferences. We understand that maybe he doesn't have the full handle on the Aryan Brotherhood that he would like to or whatever. We are simply suggesting that we don't want this case decided on an improper basis anymore than Mr. Swierzbinski does. To the extent that he wants voir dire to probe that question, we are not objecting.

THE COURT: Does the State contemplate – should this case reach a penalty phase – introducing anything more related to the Aryan Brotherhood other than that the defendant is a member of that organization?

[A-17] MR. WHARTON: I think there would have to be some explanation of what the Aryan Brotherhood is. I don't think in essence listing membership in the Aryan Brotherhood in a vacuum is going to be too informative to the jury who doesn't know the Aryan Brotherhood from any other group. So I think I would anticipate there would have to be some explanation of what the group is at least locally.

THE COURT: What is it locally?

MR. WHARTON: Essentially what Your Honor mentioned. It is a white supremacist Nazi oriented gang of prisoners. They are not as great a problem with Latinos. It is very anti-black and I guess –

THE COURT: Are there acts of violence attributable to the Aryan Brotherhood in the Delaware Correctional Center?

MR. WHARTON: There are, I'm sure. Now, it's a difficult question to say was this an Aryan Brotherhood organized sanctioned act of violence. That is a difficult question given the secretive nature of the organization. So I can't give Your Honor a definite answer yes or no on that.

* * *

(MR. SWIERZBINSKI:)

[A-18] I think Mr. Butler and I had arrived at an understanding on Friday, and Charlie could correct me if I am wrong, but the State will not introduce anything about the Aryan Brotherhood on trial and I think their only concern was that I might intentionally bring something like that on cross-examination. I indicated to him I

certainly don't intend to get into that on trial. I think we agree on that.

MR. BUTLER: Essentially.

MR. SWIERZBINSKI: I think what it boils down to is whether or not this would come in on the penalty hearing. Our position once again as I tried to state last Thursday was that such evidence is clearly, number one, not [A-19] only is it inflammatory, it is also in violation of the First Amendment. Because what –

THE COURT: I understand your argument. It is not necessary to repeat it.

MR. SWIERZBINSKI: I am saying what he believes is not necessarily what he does. If the State could produce certain evidence that he did something, that would be fine. I do not think it is an unreasonable request to have the State give us an offer of proof.

If I understand Mr. Wharton correctly at this point, he doesn't know what he would do in a penalty hearing. We are starting trial in an hour or so. At this point they should have a fairly good idea on what they are going to do. If they don't know what they are going to do basically they are just going to be introducing it for the sake of religious or racial prejudice.

I need to know when Your Honor is going to rule so I know what I can do in terms of picking a jury. I would like to have blacks and Jews sitting on the jury because if sociologists are in any way correct they are the people who are the most compassionate and most understanding, and the people that would tend to give David Dawson a break on the issue of guilt or innocence.

[A-20] At the same time they are the same people – if sociologist [sic] are correct – are the people who would be against the death penalty if we get to a penalty hearing.

I don't want to strike those people who probably would be some of our best jurors, but I can't let them sit if they are going to be influenced racially by someone or by evidence that this defendant hates blacks and he hates Jews. That is my dilemma.

I would respectfully suggest case law clearly says a penalty hearing is not a no holds barred hearing. There are certain guidelines that can be overstepped. I would suggest that if the Court permits that to be introduced as entering a number of arbitrary and capricious factor [sic] which is not envisioned in the death penalty statute.

Basically, as I said, I don't want to strike blacks and Jews from the jury just because of that. I think the Court would be forcing me to do that if the Court permits the racially and religiously prejudicial evidence to come in. I am just trying to make a record clear.

I also want the record clear, if this is ever reviewed, I am personally not prejudiced against blacks or Jews. I have friends who are black. I have friends who [A-21] are Jews. They have been in my house and I have been to their homes. I don't bear any prejudice against either race.

In terms of representing this man, I have a real problem having blacks and Jews on the jury if the State is going to introduce prejudicial evidence because it is racial or religious.

THE COURT: If we reach a penalty phase, is there going to be testimony from the defense relating to model prisoner status at the Delaware Correctional Center?

MR. SWIERZBINSKI: No, sir. We will put on witnesses, but I am not going to have anyone say David Dawson is a model prisoner.

THE COURT: You agree that membership in a prison gang would then become relevant at that stage?

MR. SWIERZBINSKI: It all depends what Your Honor's definition of prison gang is. I mean, if Your Honor is saying –

THE COURT: Aryan Brotherhood.

MR. SWIERZBINSKI: I would respectfully suggest that if that is introduced and it's going to be introduced solely for the basis of racial and religious prejudice that Your Honor has the authority to keep it out [A-22] because the prejudice so grossly outweighs any relevance that it might have, when Your Honor balances what comes in and the harm is done it is clearly showing there is prejudice.

MR. WHARTON: Your Honor, we can't anticipate with certainty what evidence, if any, the defendant will attempt to put on in a penalty hearing. I think that is why it's difficult to rule or to make a determination in a vacuum until we see how things shape up. Until we see how things shape up, I think Mr. Swierzbinski must make his best judgement – concedingly a difficult decision – but he must make his best judgement about what type of

voir dire questions he wants to ask the jury and what type of people he wants on a jury.

This affiliation with this group is not something the State can concoct but it's part of his client's makeup, part of character and part of his propensities. I think to the extent he is in a difficult situation is because of what the defendant has done with his life and we are saying, the State is saying to the defense go ahead and phrase your voir dire questions how you choose and exercise your peremptory challenges as you choose, but keep in mind the State intends to or considers this membership part of the defendant's character and propensities.

* * *

[A-23] MR. SWIERZBINSKI: Your Honor has still never ruled on our request of the motion in limine. Do I take it Your Honor is saying if we get to a penalty hearing everything about the Aryan Brotherhood can come in? Is that what Your Honor is saying?

THE COURT: No. What I am saying is what I have already said. The State is prohibited from introducing any evidence or evidence relating to the Aryan Brotherhood without leave of the Court. I will judge its probative value and any defense balancing as necessary under Rule 403 in the context of what proceedings are at the time in which the evidence is offered.

* * *

* * *

[C-77] MR. SWIERZBINSKI: Your Honor, may I have an opportunity to make a record?

THE COURT: You may.

MR. SWEIRZBINSKI [sic]: Thank you, Your Honor. As Your Honor is aware, when we struck the last juror Doris Seman, just before the morning recess, that was the defendant's 20th peremptory challenge. As the Court is also

* * *

[C-88] THE COURT:

* * *

For purposes of jury selection from the initial 92, the motion for additional peremptories is denied.

In this case, however, an additional panel may be utilized should the jury not be selected from the initial 92 prospective jurors. The Court is cognizant that peremptories are generally exercised with an awareness by counsel of whom may be next to be called as a prospective juror.

Under the circumstances of this case, I will consider granting additional peremptories should the jury not be selected from the initial 92, but until we reach that point the motion for additional peremptories is denied.

* * *

[C-89] I will at least like the opportunity to place on the record whether we would have struck the additional juror or accepted the juror if we had any opportunity to do so just for the sake of record.

THE COURT: Mr. Wharton?

MR. WHARTON: Your Honor, that is so self-serving that it doesn't even bear comment. If they don't have a right to exercise a peremptory, there is no reason why we should get into asking well, if you really did have a peremptory what would you do, simply to make a record at some later time. Well, I would have exercised x number of preemptories. I think that is so clearly capable of abuse for purposes of a future record it would have no validity at all.

[C-90] MR. SWIERZBINSKI: Your Honor, I approach this matter very seriously because I realize in any case like this there is always the chance of review by the Supreme Court. I made my application which I believe is reasonable and I will abide by whatever ruling Your Honor gives us, but I just want to make sure that the record is clear that if we ever have to take this up to the Supreme Court the Supreme Court doesn't say why didn't you ask for the opportunity.

If Your Honor says that Your Honor won't let me make a record, I will live by Your Honor's ruling and I respect it. I just want to make sure if the Supreme Court ever says we should have made a request and relief is denied because I did not – I want it clear that we did make the application.

THE COURT: Your application is noted and it is denied.

* * *

[D-71] THE COURT: That is the fifth preemptory challenge of the defendant which exhausts the additional preemptories; is that correct?

MR. SWIERZBINSKI: That's correct, Your Honor. We would respectfully request that Your Honor give us additional preemptory challenges so we can pick an impartial jury. I assume the State would want to be heard on that. We make it for the same reason we made it yesterday.

MR. BUTLER: Your Honor, I don't believe the defense needs preemptory challenges in order to pick an impartial jury. I think the Court is picking an impartial jury. The defense has had now 25 preemptory challenges to pick a jury that it likes and that is five more than is even required. The State has had the same constraints that the defense has had and it is flat out unfair to give the defendant more challenges at this point.

* * *

[D-72] THE COURT: The application is denied.

* * *

[L-43] MR. SWIERZBINSKI: Your Honor, may counsel approach the bench, please?

THE COURT: You may. Court reporter will come forward.

MR. SWIERZBINSKI: Thank you, Your Honor.

(Whereupon, a sidebar conference was held as follows:)

* * *

MR. SWIERZBINSKI: The State has indicated before they would take into evidence the facts concerning the Aryan Brotherhood and, I think, we would request at least to have some [L-44] offer of proof as to how far they are going to go with that. If Your Honor admits that, we will have to deal with that. I don't think that even in a penalty hearing the State should have an unbridled opportunity to introduce anything they want about the Aryan Brotherhood. If Your Honor rules that that is admissible, I need to know where we are going to go.

THE COURT: In the event that there is a need for a penalty hearing, I will take up any evidentiary issues that counsel wishes. We will, at least, discuss them before the hearing itself.

* * *

MR. BUTLER: Your Honor, we have a situation. I will just describe it to the Court not that I think you necessarily have any answers for us, but among the evidence Mr. Swierzbinski is quite correct that we will be seeking the introduction of evidence concerning the Aryan Brotherhood. Now, we have tentatively contacted

an expert in the field of prison gangs who resides in Washington, D.C., who would be a witness that the State would proffer with respect to the Aryan Brother- [L-45] hood, generally.

I hesitate – that if we are not going to deal with the admissibility of that evidence at all until Monday morning, we have got a problem of getting him over here Monday sometime to testify. I suppose we could put some other evidence in ahead of time so that it wouldn't necessarily be a problem.

THE COURT: Would counsel be prepared to address that issue this afternoon?

MR. BUTLER: We would.

MR. SWIERZBINSKI: Your Honor, if the State is going to be calling an expert, we are at least entitled to know who that is ahead of time and the nature of his expertise. Mr. Butler says expert about prison gangs. I think we ought to know a little bit more than that.

MR. BUTLER: There are two different questions there. One is the testimony admissible and the second – and we are certainly willing to proffer his expertise and so forth. I don't think that is the real issue. I think the real issue is whether the Court is going to allow any such testimony at all. I don't mean to push the Court to judgment on that question. If counsel wants more time to prepare for it, I have no problem. It is just in terms of scheduling.

* * *

[L-46] MR. SWIERZBINSKI: It depends on – I was not aware [L-47] they were going to call an expert until a couple of minutes ago.

* * *

[L-55] THE COURT: Mr. Swierzbinski, I understand you have an application in limine regarding the evidence which you are concerned that the State may offer.

[L-56] MR. SWIERZBINSKI: Yes, Your Honor. We spoke in the law library while we were waiting for Your Honor. Mr. Butler pretty much outlined what the State was intending to do.

THE COURT: Well, let me hear Mr. Butler outline it. I will have it first-hand.

MR. BUTLER: Your Honor, when I spoke to Mr. Swierzbinski, I did advise him that I have to advise the Court and Mr. Swierzbinski, based upon a somewhat sketchy outline that I have from a gentleman by the name of Gary Aaron – Mr. Aaron is employed by the Federal Prison System. Specifically, the Correctional Services Branch and his particular area of expertise, I suppose, one would call it is in disruptive groups. That is what the Federal Prison system calls them.

In his specific duty he is in charge of monitoring all disruptive groups within the Federal Prison System. Mr. Aaron's specialty, obviously, is prison gangs and he has developed that expertise over – quite frankly, I don't have a copy of his curriculum vitae or his resume, so I can't give the Court specifics. So I can suggest that I believe he worked within the State system in California and has also worked as a liaison in the State system of Texas.

My problem is I don't know if he was a Federal employee at the time or whether he was employed by those State [L-57] systems directly. But, once again, when

this goes back to the early '70's, his job was acting as a liasion [sic].

He also has been an instructor, instructing prison authorities; both federally and within State institutions, on identifying members of disruptive groups, as well as the particular functions, roles, goals and so forth of disruptive groups, generally and specifically.

He is familiar with the Aryan Brotherhood and he is familiar with them generally in California; with their reasons for their initial appearance in California. He is familiar with their penetration, if you will, into other institutions. He is familiar with the national goals of the Aryan Brotherhood, and I state specifically two goals that he ascribes to the Aryan Brotherhood; the control of drugs within the prison institutions, and they are also associated with the violent attempt escapes, escape attempts.

He, also in order to be complete with respect to his testimony, he is familiar with the national norms, if you will, for the Aryan Brotherhood. That is to say that he can tell us what Aryan Brotherhoods generally ascribe to, what their goals are, what their orientation is.

He has expertise with respect to specific State adaptations, if you will, of those national goals. For example, [L-58] he will tell us that Texas Aryan Brothers do not recognize Arizona Aryan Brothers and vice versa and members of the Aryan Brotherhood in the State system don't necessarily recognize Aryan Brothers within the federal system. That there are cells or specific off-shoots within various local jurisdictions that don't see eye to eye or share a union, if you will.

He can testify about initiation. He can testify about tattoos. He can testify about specific emblems or insignias that are associated with the Brotherhoods.

I suppose that is all proffered for the purpose obviously of showing something about what it means to be in the Aryan Brotherhood or what the general tenor of the Aryan Brotherhood is.

He is not familiar with the Delaware off-shoot of the Aryan Brotherhood and our information at this point would indicate that Delaware does not have a resident expert within the prison system available to give testimony as to the specific attributes of the Aryan Brotherhood within the State of Delaware. So that he can help the jury in the sense that he can tell us something about Aryan Brotherhoodism. He can tell us what that is.

He will concede that he is not familiar – he recognizes obviously there are off-shoots within State insti-
[L-59] tutions. All of them sharing common attributes. It's those common attributes that the State seeks to introduce in this case while conceding that he does not know what specific attributes might be applicable to a Delaware inmate who is a member of an Aryan Brotherhood.

That is the general proffer of his testimony. Again, I need to speak to him again to get specific answers to specific questions that we would be asking him if his testimony were allowed.

THE COURT: How would this be tied into the defendant David Dawson?

MR. BUTLER: Well, Your Honor, as I said, it wouldn't be tied in in a specific sense. The State can't

produce an expert who can tell us that David Dawson holds this particular belief or David Dawson acts upon this particular belief. What we seek to introduce is some understanding of what David Dawson ascribes to himself, the label Aryan Brotherhood, and we will produce ample testimony on that point. That is as to on his hands, the clothing that he wears, correspondence that he keeps and so forth. I think the next question becomes he is an Aryan Brother. While the Court may have some information based on a newspaper article, we may have some information based on magazines or so on. The jury has no idea what that means.

[L-60] What we feel we need to do is give them some general understanding of what, why would somebody want to be an Aryan Brother. What does that mean, what does that tell us about the character of the defendant. We don't see it as particularly important whether the defendant has, in fact, killed in order to gain access to the Aryan Brotherhood or has, in fact, committed a violent escape in order to get in, or has killed another inmate to get in or so forth. But the fact that he ascribes to that general set of ideals, which the expert can tell us about, and he does ascribe to them by reason of all these tattoos and other evidence that I have suggested to the Court, tells us in itself –

THE COURT: Let me hear the details as to this. You contend he ascribes to those particular ideas by virtue of what, tattoos of what?

MR. BUTLER: Tattoo on his right hand that states Aryan Brotherhood and the two words being separated by an emblem of approximately five swastikas

tattooed on his back. I believe there may be an additional swastika tattooed on his arm. The belt that the defendant was wearing had two letters A and B separated by a swastika on the buckle.

THE COURT: This is what he was wearing when?

MR. BUTLER: At the time he was apprehended. [L-61] Correspondence has been seized on two different occasions from his cell. There are –

THE COURT: That says what?

MR. BUTLER: Well, one says, for example, greetings my Aryan Brother. There are a lot of, I guess, I would call them doodles, if you will. They are pages with sort of rudimentary art work in the cell with Aryan Brotherhood, Aryan Brotherhood forever, Aryan Brothers live.

There is at least one other letter that was seized shortly – I think it was in the spring of 1987 wherein the defendant says that Aryan Brothers must take flight. There is literature describing something called Odinism and that, apparently, ties into this. Your Honor, I haven't read the whole thing, but –

MR. WHARTON: It is a little tedious.

MR. BUTLER: It has to do with white supremacy. Maybe Ferris read it. Did you read the whole thing?

MR. WHARTON: I couldn't get through the whole thing. It deals with kinds of white supremacy as religion.

MR. BUTLER: Your Honor, painted in his cell in probably a flag form that has not been seen since the third reich is a tremendously large swatiska [sic] painted in red, white and black, and I don't know the answer to your next question, how you are [L-62] allowed to do that in a prison cell. I don't know.

THE COURT: It's on the wall?

MR. BUTLER: It's on the wall in his cell. All of these swatiskas [sic] and so forth are obviously tied into the Aryan Brotherhood. So that becomes all – again, the State doesn't see it as particularly necessary for it to show that the defendant has undergone some right of initiation into this group. In fact, the expert would tell us that although this is a well recognized group nationwide, he can only identify positively and without equivocation, 120 full-fledged members have what he calls earned their bones. Earning your bones for the Aryan Brotherhood requires either a murder or an attempted murder of another inmate. That has to be either a rival gang member or a defector from the Aryan Brotherhood.

Again, he would testify that once you are in the Aryan Brotherhood, you are in the Aryan Brotherhood for life. That is where we get the expression such as blood in, blood out. Someone else has to bleed to get in. You bleed to get out.

Your Honor, I might hasten to add that although this sounds somewhat gruelish [sic], we don't think it's important to get into this, is what he essentially wants to do is kill somebody in the prison. The point is that someone needs to explain a general set of ideals. In other words, we are looking at the [L-63] character of this man,

David Dawson, and not only things that he does. We know some of the things he does. They will be explained by his prison record and this killing itself, but some of the things he believes in now or ascribes to. Whether he actually has killed in prison isn't important. What is important is for the jury to understand this is what he is into. This is his character. His character is he thinks the Aryan Brotherhood is a really neat organization and he believes in the things that they believe in. He wears their tattoo. He wears their belt. He carries their literature, he paints his wall and so forth.

[L-64] THE COURT: Do you seek to introduce into evidence essentially everything you have just told me?

MR. BUTLER: I suppose we have to get this out on the table and kind of see where we stand. The State is not going – we recognize that there probably needs to be some limitations on this. What we seek to introduce is sort of acclamate [sic] the jury to the Aryan Brotherhood and to acclamate [sic] the jury to what that is as a concept and what that tells us about the defendant's character. We don't object to some reasonable limitations on the expert's testimony.

I will suggest to the Court that I don't know that there is anything that I have told you that could not be put before this jury for whatever weight they want to give it and with the understanding that it is limited by his lack of knowledge of the specifics of the Delaware chapter of this organization. That –

THE COURT: Is there a Delaware chapter?

MR. BUTLER: There is a Delaware officer who could tell us that there is such a thing. Unfortunately, the extent of his correctional center's intelligence on the organization is very minimal. What it consists of is Dawson, Nave, Irwin, McCoy and a few others. I don't know how many others.

* * *

[L-67] THE COURT: Mr. Swierzbinski, I think I have heard at least the maximum proffer without all the details. What is your position?

MR. SWIERZBINSKI: Your Honor, our position would be that is the expert that the State would be proffering, really has no knowledge about the, shall we say, the local chapter of the Delaware Aryan Brotherhood is really not qualified to testify. He will be rendering opinions that are really not valid.

I have another objection that while the motion of March 25th, which was hereby – I think it was about a week or about a week-and-a-half later, sometime in the first week of April, April the 8th, I believe. There was a motion for disclosure of identity of expert witnesses. I believe it was in court that Mr. Wharton stated that the State was going to rely on three experts; Dr. Tobin, Dr. Murch and Dr. Podolack and my subsequent letter from Mr. Wharton disclosed that he was also going to rely upon Mr. Errera from the FBI.

Our position is that although this is not an expert for trial, the penalty phase sometimes is more important than the guilt phase. I learned for the first time on Friday that we are going to have a penalty hearing on Monday and

the [L-68] State is going to be calling an expert who is going to have such devastating impact on the jury and we would object for reasonably failing of disclosure for the witness. We cited to Your Honor Powell versus the State and Wheat versus the State, both of which are 527 At. 2d. One is 269 and the other is 276.

I think those cases stand for the proposition at the minimum that experts should be disclosed at a sufficient time so that defense can prepare what is envisioned when the prosecution and the defense spoke in the last few weeks concerning the Aryan Brotherhood. I assume that the State was going to introduce some evidence concerning that in the penalty phase, assuming we got there, but it was my understanding – maybe I should say it was my impression what the State was going to do was, they were going to perhaps call one of the local prison guards, being one of the officials from the Department of Correction to testify about the Aryan Brotherhood. We had no idea they were going to be calling an expert from the Federal system.

Our problem is it's 4:30 on Friday. There is no way that we can be prepared to defend such testimony on Monday morning. I am being perfectly candid with Your Honor even if we had all day Monday or Tuesday, I don't know if we would be able to find an expert period if we could, I don't know who could find an expert who could get here in a matter of hours [L-69] notice. But we would respectfully suggest to the Court that if the State is intending to use such a witness, an expert witness, we should have been told ahead of time. Since they did not, Your Honor, it would be within Your Honor's discretion to deny the use of this expert.

In terms of the substance of any testimony on the Aryan Brotherhood, we feel previously indicated that the testimony apparently would go to the defendant's beliefs, et cetera, which, although, many of us may not believe in his beliefs, I think his beliefs are protected by the First Amendment.

The State has indicated a few minutes ago that much of the testimony goes to the defendant's beliefs and for that reason also, we would suggest that such testimony would be improper.

THE COURT: Doesn't the joining of the Aryan Brotherhood provide at least some clue as to the character of the individual who would do that?

MR. SWIERZBINSKI: Yes. It provides some clue as to his character, but our position is that when it shows his character by indicating what his beliefs are, he should not be punished for his beliefs. If the jury is to impose a death penalty, they should base it on the crimes for which he has been convicted today, his crimes in the past, actions that he has [L-70] done or failed to do. But he shouldn't be punished for some abstract thought of what he believes in that he has not acted upon. The fact that he may not like any of the people in this room is not really relevant if he has taken no action against anyone. What one individual thinks in his or her mind should not be a ground used to find a fact to give to condem [sic] that person to death.

THE COURT: Mr. Butler, doesn't evidence about the Aryan Brotherhood, as it exists or may exist elsewhere, present the potential of diverting the jury's

attention away from Dawson's background and record and the circumstances of the crime?

MR. BUTLER: It does to the extent that we get bogged down in the minutia of the various state adaptations. I would agree with the Court. The State did not envision spending a morning with this expert, as I say, but we do think that the defendant's character is relevant and the fact that he would ascribe to a set of beliefs that are known to be held by the Aryan Brothers. In other words, if the defendant thought himself as a Swedenborgin, that is a Christian religion. I don't know too much about it, but I don't know if the FBI here does, but it is a Christian religion and it is a good religion. I know some people who are in it and they are good people. If that man was on trial for his life, it might make sense in litigation [L-71] for that defendant to be permitted to have someone testify as to what Swedenborgins are and what beliefs they hold, why someone would want to be a Swedenborgin and why and what that tells you about the man who is on trial. Likewise, Amish people or any other group. I mean, I merely flip it over to analytically we don't get bogged down with the fact that the defendant's particular beliefs manifest themselves through his membership in an organization that is committed to something other than laudable goals.

The fact that the group happens to be the Aryan Brotherhood shouldn't change the interest whether it's relevant and admissible and so forth, or whether it is unnecessary and unfairly diverts the jury's attention. The State's position is that the jury should be permitted to focus on the Aryan Brotherhood as an organization, as a recognized organization. But we would agree with the

Court that there is no need for this expert to get into what a specific group does in Texas or what a specific group does in California.

Again, this expert is able, we think, to delineate between those goals that he could ascribe to the Aryan Brotherhood nationally as opposed to specifically state adaptations of the group. So we wouldn't, we would agree with the Court we didn't really want to get into a major or all afternoon discertation [sic] on this witness, of the Aryan Brotherhood, generally. But [L-72] more specifically, only to the extent that he helps explain to the jury what does it mean, what does Aryan Brotherhood mean, what does that term mean and what might that term, how might that show something about the character of the defendant. So, I agree with the Court to an extent, but I don't think that renders such testimony completely nugatory.

THE COURT: What is your response to Mr. Swierzbinski's position that this expert was not disclosed?

MR. BUTLER: Well, Your Honor, aside from the fact that we haven't developed until about a week ago – I have some difficulty with the idea that he is an expert or he is not being asked as the proffer has suggested. We are not really asking for his opinion. I might have more sympathy, if you will, for the defense's position if my final question of this expert were to be: Mr. Expert, do you have an opinion as to whether or not the defendant is going to kill somebody while he is incarcerated, or do you have an opinion as to whether the defendant is a dangerous individual or do you have an opinion as to

whether X, Y, or Z. That is not really what he is being called for. He is really here to give background and information on an organization that the jury may not be familiar with. He is not an expert in the sense that he is not being asked to give an opinion on anything and if I don't know – I am not sure what the complaint [L-73] is as far as the failure to disclose. What expert could even conceivably be found that would say something different? I mean, you see this isn't the kind of thing you take a piece of scientific evidence and one expert says that is blood having these compounds and another expert analyzes that blood and says it has these compounds. It is not a scientific kind of witness. He is there to provide general background information to help the jury understand.

I have already told defense counsel that we would make available to them such DCC authorities as might be determined helpful on the question of what the Aryan Brotherhood in Delaware is or means, but I just don't see it as expert testimony to begin with. I just don't think the problems exist of notice that might exist in other context. There is no evidence to be re-analyzed by another individual and so forth. So I just don't think that the complaint is well taken.

As I say, I don't know of another expert, so I can't help the defense. I don't know that another one exists anywhere. I don't know that it is an expert. As I say, I don't know if it is expert testimony to begin with. It is something to help the jury on a relevant point.

THE COURT: Mr. Swierzbinski.

MR. SWIERZBINSKI: Your Honor, I couldn't disagree [L-74] with Mr. Butler more. This individual is being proffered by the State to give damaging testimony to what the State contends my client believes in because they feel that they need him so they can put my client to death. As I indicated, Your Honor, I have no idea whether or not we can even find another expert, but I believe Your Honor is aware that our office keeps a log, if you would call it, of various experts on various fields. We would obviously want to consult with our office on that. If our office does not, we would obviously want to make inquiries to see whether or not there is any other such expert anyplace. I don't know if we can find anyone.

THE COURT: Mr. Butler, the witness was developed when, in the past couple weeks?

MR. BUTLER: Actually, Wednesday of last week, Your Honor. All right. Mr. Swierzbinski.

MR. SWIERZBINSKI: Your Honor, the other point is if this gentleman knows nothing about the Aryan Brotherhood in Delaware, assuming that it exists, we fail to see how he can offer relevant testimony about this organization. Does the Aryan Brotherhood just taking Mr. Butlers proffer at its face – the Aryan Brotherhood in Texas believes other things or hears a certain penance or as another Brotherhood in California or other states, and the gentleman can tell us what those various chapters [L-75] believe in. But he has no contact with Delaware. How can he possibly give this jury relevant information which in any way would relate to David Dawson? He is basically going to be giving them inflammatory information which cannot be tied to the defendant.

THE COURT: Mr. Butler, is that so?

MR. BUTLER: Your Honor, again, I think that what we are doing here is we are confusing the specifics with the analytics that are necessary to be applied. This expert can tell us what the Aryan Brotherhood is in general terms. It is just like –

THE COURT: As it exists where?

MR. BUTLER: As it exists nationally. In other words, there are certain tenets of the Aryan Brotherhood that run through all of the organizations with which he is familiar in any state you want to state.

THE COURT: He does have knowledge about Delaware.

MR. BUTLER: He has knowledge of all the states with which he is familiar. He doesn't know about the Delaware chapter, so he can't tell us what the Delaware chapter does in that particular quirk or this particular angle. What he can tell us, just like he was going to describe Christianity. He can tell us what all Christians believe in. He can't tell us maybe [L-76] as to a specific tenet of Methodism or Catholicism, but he can tell us what Christians believe in. It is the same concept. Analytically he can tell us what the Aryan Brothers believe in. He can't tell us what Delaware Aryan Brothers believe in except to the extent that Delaware Aryan Brothers sort of per force must have the same general –

THE COURT: What is it again he would testify they would believe in?

MR. BUTLER: That's where my proffer starts to get thin, Your Honor, because I only talked to him for about 15 minutes.

MR. SWIERZBINSKI. We would suggest that if he doesn't know specifically what Delaware Aryan Brothers believe in, assuming there is such an organization and with the various beliefs differing throughout the country, he would be merely offering speculation even to the general Delaware Aryan Brotherhood tenets. If he doesn't know anything about this local organization, how does he have knowledge whether or not this local organization adheres to all tenets of the, let's call it the Aryan Brotherhood national. Any evidence that he gives will be purely speculative. It is speculative. It is irrelevant. It can't be tied into David Dawson unless the State can somehow tie that into the defendant. Specifically, all the State is [L-77] going to be doing is inflaming the jury against David Dawson.

THE COURT: Any further comment?

MR. BUTLER: Your Honor –

MR. SWIERZBINSKI: I have one other point but I can –

MR. BUTLER: Go ahead.

MR. SWIERZBINSKI: In my notes, Mr. Butler made a comment that this is kind of tangent to Aryan Brotherhood. Apparently certain correspondence was seized from my client's cell which apparently ties him into the Aryan Brotherhood. Before we have the hearing on Monday, I believe we have the right to at least see that

correspondence and, if any of it is in his own handwriting, it would become a stay which is clearly discoverable under Rule 16. *Just because there is a conviction, I don't* think Rule 16 has been suspended. I would request the opportunity to see any statements written or otherwise stated as a proffer against my client prior to the hearing.

THE COURT: You may make that request directly to the State. The immediate issue before the Court is your motion in limine as to the testimony of Mr. Gary Aaron.

MR. SWIERZBINSKI: Yes, Your Honor.

* * *

[L-78] THE COURT: Regarding all of the evidence that the State would proffer on the Aryan Brotherhood, have you [L-79] covered that in your proffer?

MR. BUTLER: Yes, Your Honor.

THE COURT: Other than perhaps painting his wall, has Mr. Dawson, in conjunction with his Aryan Brotherhood membership as it is purported to be, done anything unlawful while in prison?

MR. BUTLER: Well, he may well have, Your Honor. Nothing that we have caught him at.

THE COURT: Anything that the State could offer?

MR. BUTLER: No, Your Honor. As I said, it is understood that this witness' testimony would be with that caveat. We don't think it is important that whether he acted or not acted on his membership in this group – what we think is important is that that is the kind of

thing that he ascribes to. That is his character. He thinks that the Aryan Brotherhood is an organization that he wishes to align himself with. That is pretty clear. I mean, the minor premise, if you will, linking him to the group is pretty clear.

MR. SWIERZBINSKI: Your Honor, our position on that is if I may give Your Honor two examples. Let's assume for the sake of argument that the State would prove by some means that my client likes Adolph Hitler. Let's also assume that the State could prove by some means that my client likes the Pope. [L-80] If he takes no action based on his like for Adolph Hitler or like for the Pope or dislike for the Pope, so what. If it is a feeling he has, if it is a belief he has, it is totally irrelevant. If the State can tie that in, that because of his belief, he has acted in some improper way, then it becomes relevant. But if it is a belief, something that he has in his mind, it is totally irrelevant. The jury should not be permitted to consider that.

THE COURT: Are there any other evidentiary issues other than the Aryan Brotherhood membership that you are aware of now?

MR. WHARTON: Your Honor, one of the non-statutory aggravating circumstances which we have described to defense counsel relates to the Aryan Brotherhood. So it kind of assumes in that fascination with the Nazi symbolism and what not.

THE COURT: Do you have your written notes?

MR. WHARTON: We have just given them to defense counsel.

THE COURT: Do you have a copy for the Court?

MR. WHARTON: Yes. I didn't want to interrupt the discussion.

THE COURT: Continue.

MR. WHARTON: Yes. It is on Page 3 and it is [L-81] number eight on Page 3. The Aryan part of the name kind of establishes or incorporates the Nazi symbolism and, perhaps, it might be something maybe necessary to bifurcate in some fashion; Aryan Brotherhood vis-a-vis Nazi fascination.

THE COURT: I am not sure I understand what you are saying.

MR. WHARTON: Well, I don't know what the Court is going to rule. If the Court takes one position with respect to the Aryan Brotherhood, we would still want to talk about the declaration, devoting his life to Nazism, things Nazi, let's put it that way, as an indicator of his character and propensities.

THE COURT: That would be independent of the Aryan Brotherhood membership?

MR. WHARTON: When this was typed up, my thought was that was incorporated in it but I think it is severable if it has to be.

THE COURT: When you say devoting his life to things Nazi, what do you mean?

MR. WHARTON: Well, as already indicated, the cell decoration and also by decoration with the German Eagle and swatiskas and things of that nature and

tattooed all over large portions of his body, the belt buckle of the belt that was introduced in evidence has a huge swastika on it. That's [L-82] what I mean. Obviously, the swastika stands for certain things in the world and the fact that he seemed to have such an affection for them, I think is important in describing his character and propensities.

THE COURT: Mr. Swierzbinski.

MR. SWIERZBINSKI: Once again, Your Honor, our position is that if the State can only show a belief that is not sufficient; whether it is Nazism or Aryan Brotherhoodism or whatever. If they can tie that into an act because of my client's alleged Nazi beliefs that he specifically – and let's say, for instance, incited a prison riot or whatever they want to, if they can tie it into an act, they should be entitled to introduce that. If it is something that this man has in his head and merely paints it on his wall, he shouldn't be put to death for that.

MR. WHARTON: Your Honor, I think that is fine. I mean if the defense is not inconsistent in their logic. If they want to introduce or if they think that things that he has done – excuse me, organizations he has joined, beliefs he may hold that are good are admissible to show his character and propensities in a penalty hearing, then the same thing applies for beliefs and organizations he has joined which are bad. You can't have it both ways. They are either all in or all out. [L-83] If they want to stipulate they are not going to offer any testimony about good beliefs he has or good organizations he has joined, if he has never acted on those good beliefs or good organizations, then fine.

THE COURT: Well, I will narrow the issues to some extent. The Court does find that membership or the act of joining an organization of any particular kind, whether it be the Aryan Brotherhood or the Boy Scouts of American [sic] can be probative of character, at least to some extent. The real issue before the Court is whether the probative value is outweighed by the danger of unfair prejudice. So, let's focus the argument that way.

MR. WHARTON: Could we take a few minutes, Your Honor?

MR. BUTLER: Your Honor, I think we should talk about this for a couple minutes if the Court would indulge us.

THE COURT: All right.

MR. BUTLER: Thank you, Your Honor.

(Whereupon, a brief recess was taken.)

MR. WHARTON: Your Honor, we have reached what we call an agreement in principle but not in specifics yet, which would result in kind of a stipulation about the defendant's association with the Aryan Brotherhood and a brief description [L-84] of that group which I think we can work out somewhat along the lines of the language that was used in the voir dire question. Perhaps slightly more explanatory, but in that general vein. We have not worked out the exact wording, but I think we are agreed in principle to dealing along that fashion.

MR. SWIERZBINSKI: What we agreed to do, we have exchanged phone numbers and we will try to work it out before we get here Monday morning. The State has agreed not to call Mr. Aaron. Therefore, we

wouldn't need time to get an expert to rebut whatever he might say. I can represent to the Court we will try to work it out before we get here on Monday.

THE COURT: All right. We will meet again then at 9:45 on Monday.

Assuming that you are able to work that out, does that mean that the motion in limine will be moot?

MR. SWIERZBINSKI: Yes, Your Honor.

THE COURT: All right. We will meet again on Monday at 9:45.

(Whereupon, the in-chambers conference was completed.)

* * *

* * *

[M-4] THE COURT: Counsel, this is a continuation of our conference that began on Friday. Have you reached an agreement regarding the issues involving the evidence of the Aryan Brotherhood?

MR. WHARTON: We have agreed as to language which can be used to describe the Aryan Brotherhood and we are in the process of preparing the typewritten stipulation to that effect.

THE COURT: Mr. Swierzbinski?

MR. SWIERZBINSKI: That's correct, Your Honor. We agreed last night about 9:30 by telephone, I guess, and I think that should resolve that issue.

* * *

[M-22] THE COURT: Anything further before the jury is brought in?

MR. WHARTON: Yes. I think we have in some way done this already, at least as far as the Abaddon reference is concerned, by virtue of our letter, but we would seek to introduce evidence that the defendant refers to himself as Abaddon and what Abaddon means during the penalty hearing. In addition, we will be seeking to introduce photographs of the defendant one of which is a photograph of his lower torso which has a tattoo of the word Abaddon in red letters across it. I have cropped out any portion of that [M-23] photograph which tends to show the defendant's pubic hair.

The other photograph of tattoos we would seek to introduce would be photographs of the tattoo on the back

of his hand which reads Aryan Brotherhood with the emblem on it and the tattoo on his back which are multiple tattoos of swastikas. I think we have at least put everybody on notice to that and probably the witness we would introduce the swastikas through, the tattoos would be Detective Huttie.

We intend to introduce a photograph of the defendant's prison cell which has a huge swastika painted in it and that will be done through the testimony of correctional officer Billie Smith. We think we have fulfilled our notice requirements as we indicated we would pursuant to the defendant's previous motion in limine.

MR. SWIERZBINSKI: May I have a second, Your Honor?

THE COURT: All right.

(Pause.)

MR. OTLOWSKI: Your Honor, with regard to Mr. Ferris' proposal to introduce –

THE COURT: Mr. Wharton.

MR. OTLOWSKI: Excuse me, Mr. Wharton's proposal to introduce the tattoos and various pictures, I [M-24] think they are inflammatory and not probative of what we have here. We have had a stipulation to the Aryan Brotherhood that explains that. We really see no place in this proceeding for the picture of any tattoos or pictures of the gentleman with that particular tattoo.

THE COURT: What is the stipulation?

(Document handed to the Court.)

THE COURT: Mr. Otlowski, read what has been stipulated to into the record.

MR. OTLOWSKI: It is a stipulation dated today and signed by all four attorneys. It is hereby stipulated and agreed by and between Ferris W. Wharton, Charles A. Butler, Paul S. Swierzbinski and Raymond J. Otlowski, for the defendant, as follows: The Aryan Brotherhood refers to a white racist prison gang that began in the 1960s in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.

THE COURT: Mr. Wharton, in view of this stipulation, what is the probative value of the evidence relating to the swastikas?

MR. WHARTON: Your Honor, swastikas are a [M-25] symbol which have obvious connotations. The defendant has decorated his room, his clothing as evidenced by the belt he was wearing when he was captured, and his person with swastikas. I think that it is indicative of a person's character they would become so immersed and have such an affinity for a symbol which is so offensive to most people. I think it clearly reflects what kind of person David Dawson is and it goes directly to his character and his propensities.

THE COURT: Is there other evidence that makes the same point that the evidence relating to the swastikas would make the State intends to present; in other words, can that particular character trait – will it be shown by other evidence independent of swastikas?

MR. WHARTON: No.

MR. OTLOWSKI: Your Honor, I haven't done an in-depth study of the swastika or Nazies or what exactly it means, but it seems to me it is evidence for the most part of white supremacy that is contained in the stipulation. What else the swastika stands for, I don't think we can let the jurors speculate and get into this area and get into speculation.

We have stipulated a member of a white [M-26] supremacist group for what that means and it seems to me any other meaning of the swastikas allows the jury's mind to wander to everything they ever heard or seen about it and that is to me not appropriate. It is not probative and I think it is inflamatory [sic] to let it in.

MR. WHARTON: Your Honor –

THE COURT: Mr. Wharton, is the State aware of whether any of the jury members fought the Nazies in World War II?

MR. WHARTON: No. I point out, Your Honor, I don't have the record in front of me – strike that. I don't have the answer to that question.

THE COURT: What is your position regarding the Abaddon tattoo? Is it the same?

MR. OTLOWSKI: I think they can testify he has a tattoo or does have a tattoo or he used this identity, but to show the photograph would be inflammatory and we ask that be stricken with the same argument, Your Honor.

MR. WHARTON: Your Honor, it is one thing to in essence adopt a nickname and call yourself something

which may in a year or two years or some bit of time become something one no longer wishes to be referred to; however, to take the step of tattooing on one's person in letters that [M-27] are probably a couple inches high a name such as Abaddon I think shows a depth of commitment to that type of persona that he has adopted. He is not just someone who is fooling around, playacting I am Abaddon. He is someone who is really committed to becoming Abaddon.

Your Honor, at this juncture in our case in chief, the State won't introduce photographs of tattoos or swastikas; however, we would reserve the right to introduce those photographs should they be relevant on cross-examination of witnesses.

THE COURT: All right. The Court will direct that swastika evidence should not be introduced without leave of Court and we will proceed. Regarding the evidence relating to the Abaddon tattoo, I am satisfied that it is relevant and that it is not subject to exclusion under Rule 403.

* * *

[M-34] MR. BUTLER: Thank you, Your Honor. Ladies and gentlemen of the jury. When Mr. Wharton opened this case to you a couple of weeks ago during the guilt phase of the trial, he told you that the guilt phase would be utilized for the purpose of establishing guilt or innocence and he told you further that the sentencing phase, if one became inevitable as it has, would be used for the purpose of obtaining justice.

We are at the stage of the case, ladies and gentlemen, and as the Court briefly outlined the procedure the purpose of my comments will be really to give you some orientation as to what your role at this stage of the proceedings is.

[M-35] Ladies and gentlemen, not all death, not all death caused at the hand of another person is a homicide. Some are accidental, some are self-defense. Not all death is a homicide under the law.

Not all homicide is murder. There is manslaughter, there is vehicular homicide, there are other degrees, other kinds of murder or other kinds of killings that are not ruled murder.

Not all murder is murder in the first degree. There is murder in the second degree, reckless killings that manifest a cruel, wicked and deprived indifference to human life.

Only murder in the first degree, intentional killings or any of the other kinds of murder in the first degree by which you have rendered your verdicts, only murder in the first degree even conceivably qualifies an individual for a sentencing phase such as you are about to hear

today. So we are talking then about a relatively small class of all homicide.

And even within that class murder in the first degree, not all murder in the first degree qualifies an individual for capital sentencing because not all cases of murder in the first degree contain what are called statutory [M-36] aggravating circumstances.

Ladies and gentlemen, what the General Assembly has done, what our law does, is separates out those cases of murder in the first degree and attaches separate labels to situations that aggravate the murder, that make it worse, if you will, that make it more culpable than an ordinary murder in the first degree which, as I suggest to you, is by no means an ordinary homicide to begin with. So we have again narrowed the class of cases even smaller to those cases that involve statutory aggravating circumstances.

The sentencing phase requires that the State show to you the jury the existence of statutory aggravating circumstances before the State can go any further, before these proceedings go any further at all. There must be the existence of statutory aggravating circumstances and the State must prove them beyond a reasonable doubt.

Now, as it happens in this case, the State has alleged the existence of statutory aggravating circumstances they being, for example, the fact that the murder was committed during the commission of an escape from prison or in furtherance of a plan to escape from prison, the fact that the murder was committed pursuant to a robbery and the fact that the murder was committed for pecuinary [sic] gain; [M-37] that is, some financial benefit to the actor.

There are three statutory aggravating circumstances in the case: The fact the murder was committed during the course of a robbery; the fact the murder was committed during the course of an escape has already been decided by you members of the jury, it has already been decided when you rendered your verdicts on Friday convicting the defendant of murder in the first degree; that is, murder during the course of an escape; and murder in the first degree; that is, murder committed pursuant to a robbery.

So that the first part of the sentencing phase has in a sense already been completed by virtue of your verdicts, but there is more to a sentencing than simply establishing the existence of statutory aggravating circumstances. That merely delineates or limits the classifications that are death penalty eligible, if you will.

Upon the finding of statutory aggravating circumstances, we go further. The State is permitted to introduce evidence of the character and propensities of the accused and the jury is also permitted to consider the nature and circumstances of the crime. The character and propensities of the accused and the nature and circumstances of the crime are called nonstatutory aggravating [M-38] circumstances; in other words, they are not spelled out in the criminal code: This is an element or this is an element and so forth. They are simply things for you to consider, the character and circumstances, character and propensity of the defendant and nature and circumstances of the crime.

As to the circumstances of the crime, in this case, ladies and gentlemen, you have heard the circumstances

of the crime in this case. We are not going to produce additional evidence beyond that which you have already heard with respect to the nature and circumstances of the crime. You are, however, going to hear some very, very telling evidence about the character and propensities of the defendant. You are going to have the opportunity to review portions of the defendant's prison file. I say portions because it is so big that a lot of it is not useful to your determinations.

Prison file will show many, many, many trips in and out of prison. It will also show a very, very poor institutional adjustment while in prison. You are going to see certified copies of the defendant's criminal history. There are many, many, many convictions for felonys within defendant's criminal history beginning from the age of 13.

You are going to hear a stipulation entered [M-39] into between the State and the defendant. Stipulation basically is an agreement that such evidence exists without the need for calling witnesses and that agreement, that stipulation will refer to a gang called the Aryan Brotherhood. You will hear evidence that the defendant is a member of the Aryan Brotherhood and the stipulation will include the fact that the Aryan Brotherhood is a racist, a white racist prison gang and, finally, you will hear evidence as to the defendant's own proclamation of his nickname Abaddon and we will find out in a few minutes what Abaddon means. Now, aside from those nonstatutory aggravating circumstances, that is the State's case.

The defense puts a case on should they choose to. The defense is not limited by any rule except that it be relevant to something in mitigation of the defendant's sentence; in other words, things that make it less appropriate for you to impose the ultimate penalty of death. They may produce anything at all or nothing at all should they choose not to.

Your function then will be to take the statutory aggravating circumstances, the nonstatutory aggravating circumstances and together to weigh them against those factors in mitigation of the potential sentence of the [M-40] death penalty and to decide whether the statutory and nonstatutory aggravating circumstances outweigh the mitigating circumstances and whether your verdict, your unanimous verdict will be the death penalty.

Once all the evidence is in, obviously we will be back here and we will be talking more about the appropriateness of the imposition of that sentence in this case so I won't go into it at this time, but ask you only to pay attention because the testimony will not take exceedingly long. Thank you.

THE COURT: Mr. Swierzbinski?

MR. SWIERZBINSKI: We waive opening, Your Honor.

* * *

[M-49] BY MR. BUTLER:

Q. Miss Guessford, would you refer to your records be they in the original file or copies and tell us when the defendant was first incarcerated at the Delaware Correctional Center?

A. He was transferred from the youth center on [M-50] April 19, 1973.

Q. So he was put in custody April 9th?

A. April 19th.

Q. 1973?

A. Yes.

Q. And can you tell us the date of his release from custody after April 19, 1973?

A. He was released April 24th of 1975.

Q. April 24th of 1975?

A. Yes.

Q. Can you tell us the date he was next incarcerated?

A. May 2nd of 1975.

Q. When was he released again?

A. On July 9, 1975 he escaped.

Q. When was he captured?

A. He was returned the same day.

Q. When was he released after that recapture?

A. May 12, '76.

Q. Can you tell us when he was again incarcerated?

A. December 19th of '76.

Q. Can you tell us when he was released after [M-51] that incarceration?

A. June 30, 1978.

Q. Can you tell us when he was again incarcerated?

A. August 9, 1978.

Q. Can you tell us the date of his release or departure from the institution?

A. He escaped on December 1st, 1986.

Q. Is that the only other time?

A. He changed over from detentioner status from the sentence to detentioner and then he changed back to sentence status.

Q. Do you have any records from the Plummer Center in your file?

A. We should have some things in here, yeah.

Q. Do you have an entry from the Plummer Center dated February 15, 1983?

A. There is a notation on the transfer record that says he went from DCC on February 3rd of '83 and went out on a furlough.

Q. On what date?

A. 2/15, '83.

Q. How long was the furlough supposed to be [M-52] for?

A. It looks like an eight hour furlough.

Q. Can you tell us when he got back from that furlough?

A. February 15th.

Q. So he had a furlough February 15th of 1983 and got back on February 15th?

A. At a later date, I mean a later time.

Q. So the last date into custody was August of 1978 and what is the next date out of custody?

A. February 15th of '83 he was closed out as escape.

Q. February 15th of 1983 closed out as escape?

A. Yes.

Q. That was the date we were just talking about; is that right?

A. They closed him out as escape at Plummer House.

Q. Meaning what?

A. Meaning he didn't show up or he was late. For whatever reason, they charged him with escape and then they picked him back up on June 2nd of '83.

Q. So when you said he was late, you mean he [M-53] was very late?

A. Well, normally when they go out on a furlough they are supposed to be like 1:00, 1:30.

Q. Can you tell us when he was released or left custody after his incarceration on June 2nd '83?

A. On December 1st of '86 he escaped.

Q. Reincarcerated?

A. On December 2nd of '86.

Q. Miss Guessford, I would ask you to refer to your records with respect to the defendant's conduct while incarcerated. Do you have that portion of your file?

A. Yes, I do.

Q. Can you tell us the date that his conduct was first cited?

A. There is a note in here from Lieutenant Christian from September 22, 1974. There is some things from '73.

Q. Now, you say there is some things here from 1973?

A. Yes.

Q. Let's begin with the beginning. Can you tell us from a review of your records when the defendant's conduct was first the subject of any report?

[M-54] A. First paperwork here from July 17th of '73.

Q. July 17th of '73?

A. Uh-huh (affirmative).

Q. Do the records reflect the result of that report? What happened, not what happened in the incident, but what happened as a result of it?

A. He was disobeying an order; 24 hour lockup.

Q. Can you tell us the date of the next write-up?

A. October 2nd of 1973.

Q. What was the result of that?

A. They accepted a guilty plea and sentenced him to 125 days maximum isolation.

Q. What was the next time he was written up?

A. January 6th of 1974.

Q. January 6th?

A. Uh-huh (affirmative).

Q. What was the result of that write-up?

A. 24 hour lockup.

* * *

[M-57] BY MR. BUTLER:

Q. Miss Guessford, can you tell us if you have an entry for February of 1974?

A. February 28th of 1974.

Q. That is a conduct entry?

A. Yes.

Q. What was the result of that?

A. He was supposed to be heard at the Minor Board, Minor Adjustment Board, but I don't see any decision on here.

Q. Miss Guessford, the documents that you have next to you are in chronological order. I don't know if the ones you are looking through are or not. Maybe we can move this along a little bit. Do you have a copy of February 28th of '74?

A. This says he pled guilty.

Q. What was the sentence if you know?

A. He loses one week's privileges.

Q. Lose [sic] of privileges for one week?

A. Uh-huh (affirmative).

Q. Do you have a report in May of 1974?

A. May 29th.

Q. What was the result of that?

[M-58] A.24 hour lockup.

Q. Do you have a report in September of 1974?

A. September 26th.

Q. What was the result of that?

A. Thirty days lose [sic] of all privileges and 15 days in maximum isolation.

Q. 15 days of what?

A. Maximum isolation; suspended for 60 days probation.

Q. I think you have told us April 24th he was released and back in on May 2nd of 1975, correct?

A. Yes.

Q. And then back out in July 9th of '75; that is when he escaped, but was recaptured the same day, correct?

A. Yes.

Q. Let's move on then to October of 1975. Do you have any entries at that time?

A. October 3rd – let me see. There is something in here for November 6th of '75.

Q. November 6th of '75?

A. Yes.

Q. What was the result of that?

A. 15 days maximum isolation and then 30 days [M-59] lose [sic] of all privileges afterwards.

Q. Do you have any conduct notices for January of 1976?

A. January 14th of '76.

Q. What was the result of that; do you know?

A. He was found not guilty.

Q. Let's cancel that one. He was released in – let's talk about 1977. Do you have anything in October of '77?

A. October 20th of '77.

Q. What was the result of that conduct?

A. I don't see a decision for that.

Q. All right. Any more in October of '77?

A. No, I don't see any more.

Q. Move along to 1979. Do you have anything in May of 1979?

A. May 20th of 1979.

Q. What was the result of that?

A. 24 hour lockup.

Q. How about July of 1979?

A. I have one for July 5th.

Q. Tell me the result of that.

A. 24 hour lockup.

[M-60] Q. Any others in July?

A. One for July 20th, '79; 24 hour lockup.

Q. Can you tell us the next entry under conduct?

A. I have a note here from September 6th of '79.

Q. Do you know the result of that?

A. 24 hour lockup.

THE COURT: Mr. Butler, you will be permitted to continue after the luncheon release.

* * *

[M-62] BY MR. BUTLER:

Q. Miss Guessford, we left off in September of 1979. Can you tell us if there are any disciplinary notations for August of 1980?

A. Yes, August 15th of 1980.

Q. What was the result of that conduct?

A. He was sent to maximum security and spent time in there for that.

Q. Do you have an entry for January of 1981?

A. Yes, January 10th, 1981.

Q. What was the result of that?

A. Ten days in maximum isolation.

Q. Ten days isolation?

A. Uh-huh (affirmative).

Q. Any others in January?

A. January 12th of 1981.

Q. Do you have a result of that?

A. No, I have no result of that one.

Q. Moving onto March. Anything in March of 1981?

A. March 10th of 1981.

Q. What was the result of that?

[M-63] A. They informed him that this was a verbal warning and that future write-ups will bring more drastic action.

Q. How about April of 1981?

A. April 14th.

Q. What was the result of that?

A. Five days lose [sic] of good time.

Q. I think you told us about an escape in February of 1983 and a reincarceration on June 2nd of '83. What is your next entry?

A. May 5th, 1985.

Q. What was the result of that?

A. We have no decision on that.

Q. What is the next entry as far as disciplinary conduct is concerned?

A. August 5th of 1985.

Q. What was the result of that?

A. Seven days lose [sic] of privileges.

Q. Tell us what the next date for conduct entry is?

A. September 8, 1985.

Q. What was the result of that?

A. Seven days lose [sic] of privileges.

[M-64] Q. What is the next entry for conduct?

A. September 11th of 1985.

Q. What was the result of that?

A. Five days lose [sic] of privileges and five days for disorderly behavior. There were two charges connected with that.

Q. So is it 10 days lose [sic] of privileges?

A. Ten days. November 20th, 1985.

Q. What was the result of that?

A. There were two charges. First one was 14 days probation; second one was 20 days confinement to quarters.

Q. Fourteen days probation?

A. Yes.

Q. What is the date of your next entry, Miss Guessford?

A. December 22nd of '85.

Q. What was the result of that conduct?

A. Fifteen days lose [sic] of all privileges.

Q. What is the date of the next incident?

A. December 29th of '85.

Q. Do you have the result on that?

A. We have no decision on that.

[M-65] Q. How about the date of the next incident?

A. January 12th of '86 which I have no decision on.

Q. No decision?

A. Right.

Q. What is the date of the next incident conduct?

A. I have one here for November 4th of '86.

Q. What is the result of that?

A. Three days lose [sic] of all privileges.

Q. What is the date of your next conduct reference?

A. January 29th of 1987.

Q. January of 1987?

A. Yes.

Q. What was the result of that?

A. 24 hours lose [sic] of all privileges.

Q. I think you said 12/1, '86 was an escape and 12/2 was a return, right?

A. Uh-huh (affirmative).

Q. What do we have after January of 1987?

A. April 22nd of 1987.

Q. What was the result of that?

[M-66] A. 24 hour lose [sic] of privileges.

Q. Any more?

A. We have April 28th of 1987.

Q. 1987?

A. Yes.

Q. What was the result of that?

A. 24 hour lose [sic] of all privileges.

Q. Are there any more?

A. February 23rd of 1988.

Q. What was the result of that?

A. Just confinement to quarters.

Q. Do you have any other entries with respect to conduct or at least disciplinary action taken as a result of conduct?

A. I have something here from April 28th of '88, but I don't have a decision on that.

Q. Is that a conduct? Is that related to conduct?

A. Yes.

Q. April what?

A. 28th.

Q. Any others relating to conduct?

A. That is all I have in the file.

[M-67] Q. Miss Guessford, do you also have records relating to decisions made by the parole board with respect to Mr. Dawson?

A. Yes, we do.

Q. Can you tell us how many times the defendant was up for parole?

A. Six times.

Q. What was the date of his first application?

A. January 15, 1974.

Q. Was parole granted or denied?

A. He was to be reconsidered in six months.

Q. Does that mean denied or granted?

A. Denied at that time.

Q. What was the next date he was considered by the parole board?

A. June 11, 1974.

Q. Was parole granted or denied?

A. Denied.

Q. What was the next date he was considered for parole?

A. December 3, 1974.

Q. Was parole granted or denied?

A. Denied.

[M-68] Q. When was the next day he was considered for parole?

A. June 21, 1977.

Q. Was parole granted or denied?

A. Denied.

Q. What is the next date he was considered for parole?

A. June 15, 1982.

Q. Was parole granted or denied?

A. Denied.

Q. What is the next date he was considered for parole?

A. September 10th, 1985.

Q. Was parole granted or denied?

A. Denied.

* * *

[M-87] Q. Has he earned any good time?

A. Yes, he has earned quite a few days good time.

Q. What is the reasons for that as you see it in that document?

* * *

[M-88] BY MR. OTLOWSKI:

Q. With regard to Defendant's 12 which is Form 543, can you without going into painful detail tell me what the good time credits have been accrued for by Mr. Dawson?

A. Throughout the years since 1981 he has been in the Green Tree program which is a drug and alcohol program; Alcoholics Anonymous; he has worked in Medium 2; he was in group therapy; group counseling; he worked in the laundry; building worker in Medium 1 annex and currently working in MSU.

Q. Now, I ask you as part of your experience in keeping these records and making entries does this record stop after a person is sentenced for first degree murder?

A. No, it doesn't.

[M-89] Q. But it has no effect, does it?

A. No. He can earn the credits and they are posted in the file, but they are not deducted from anything.

Q. In other words, he will never earn any good time because he will never get out; is that correct?

A. He will earn the good time which could be used for honor visits, but not in maximum security. He can earn them, we can put them in the file, but they cannot be deducted.

* * *

Q. Miss Dennis, I just have a few questions for you. You recall your testimony in the guilt phase of the trial wherein you indicated you met the defendant David Dawson in the evening of January 1st of 1986 at the Zoo Bar.

[M-97] Do you remember that?

A. Yes.

Q. By what name did he identify himself?

A. Abaddon.

Q. Before he identified himself by that name to you, were you familiar with that name?

A. No, I wasn't.

Q. Did you inquire of him what that name meant?

A. Yes, I did.

Q. What did he say that name meant?

A. One of Satan's disciples.

MR. WHARTON: No other questions.

* * *

BY MR. WHARTON:

[M-100] Q. Detective Huttie, let me show you State's for Identification Z-1 and ask you to take a look at that. Do you recognize that photograph?

A. Yes, I do.

Q. Do you know about when it was taken?

A. Yes, at the arrest of David Dawson.

Q. Who is it a photograph of?

A. This is a photograph of David Dawson.

Q. Which portion of his body?

A. His two hands.

MR. WHARTON: I offer this as the next State's exhibit.

[M-101] MR. OTLOWSKI: No objection, Your Honor.

THE COURT: It is admitted. Madam clerk, you will mark it as the next State's exhibit.

THE DEPUTY PROTHONOTARY: State's Exhibit for Identification Z-1 has been marked as State's Exhibit 86.

BY MR. WHARTON:

Q. Detective Huttie, let me show you State's Exhibit 86. Specifically with reference to the defendant's right hand, what is on that, depicted in that photograph?

A. There is a tattoo on the top portion of his hand, his right hand showing a diamond shaped symbol. It is outlined in black with red on the inside. It has flames that come off the diamond shape and it has Aryan Brotherhood tattooed above and below this diamond shaped figure. Also, it has a symbol of looks like one percent in the center of the diamond.

MR. WHARTON: Your Honor, at this time I would offer as the next State's exhibit a stipulation signed by counsel.

THE COURT: Any objection?

MR. OTLOWSKI: No objection, Your Honor.

THE COURT: It will be admitted. Madam clerk, you will mark it as the next State's exhibit.

MR. WHARTON: Your Honor, I would ask leave of the Court to read the stipulation to the jury.

THE COURT: Any objection?

MR. OTLOWSKI: No objection, Your Honor.

THE COURT: You may do so.

MR. WHARTON: Thank you, Your Honor. Stipulation reads: "It is hereby stipulated and agreed by and between Ferris W. Wharton, Esquire and Charles E. Butler, Esquire, attorneys for the State, and Paul S. Swierzbinski, Esquire and Raymond J. Otlowski, Esquire, attorneys for the defendant as follows:

"The Aryan Brotherhood refers to a white racist prison gang that began in the 1960s in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware."

May I have this marked for identification, please?

THE COURT: You may. The clerk will mark the item for identification.

[M-102] THE DEPUTY PROTHONOTARY: State's Exhibit [M-103] for Identification A-2.

BY MR. WHARTON:

Q. Detective Huttie, let me show you what is marked as State's for Identification A-2 and ask you to take a look at that. Do you recognize that?

A. Yes, I do.

Q. It is a photograph, is it not?

A. Yes, it is.

Q. Do you know when and where that photograph was taken?

A. This was also taken at the time of the defendant's arrest.

Q. At Troop 3?

A. That's correct.

Q. Is it a photograph of the defendant or at least a portion of him?

A. Yes, it is.

Q. Which portion of him?

A. His stomach area.

Q. Does it fairly and accurately depict the way it appeared on December 1, 1986?

A. Yes, sir, it does.

MR. WHARTON: I offer this as the next [M-104] State's exhibit.

MR. OTLOWSKI: Your Honor, subject to the previous record we have no objection.

THE COURT: It will be admitted. Madam clerk, you will mark it as the next State's exhibit.

THE DEPUTY PROTHONOTARY: State's Exhibit for Identification A-2 has been marked as State's Exhibit 88.

BY MR. WHARTON:

Q. Detective Huttie, let me show you State's Exhibit 88 and ask you to describe what is depicted therein?

A. This is also a tattoo with the letters showing the name Abaddon tattooed across his stomach.

Q. Have you had occasion to look the word Abaddon up in the dictionary?

A. Yes, sir.

Q. What does the name Abaddon mean?

MR. OTLOWSKI: I would object, Your Honor.

THE COURT: Come to side bar. Court reporter will come forward.

* * *

[M-107] THE COURT: The objection is overruled.

[M-108] BY MR. WHARTON:

Q. Detective Huttie, what does Abaddon mean?

A. According to Webster's – it had a biblical reference also – but it meant the same thing: Angle of the bottomless pit.

MR. WHARTON: Your Honor, I don't have any other questions, but I ask State's Exhibits 86 and 88 be passed among the jury.

THE COURT: Any objection to the photographs being exhibited to the jury?

MR. OTLOWSKI: No objection, Your Honor.

THE COURT: Hand them to the bailiff. They may be shown to the jury.

MR. WHARTON: Thank you, Your Honor.

MR. OTLOWSKI: We have no questions of this witness, Your Honor.

THE COURT: The witness may step down.

(The witness stepped down.)

MR. WHARTON: Your honor, State rests.

* * *

[M-109] BY MR. OTLOWSKI:

Q. You stated your name was Louise Hickman; is that correct?

A. Yes, sir.

Q. What is your relationship to David Dawson?

[M-110] A. I am his aunt.

Q. Did he ever call you by anything else other than aunt?

A. His second mom.

Q. Why did he call you his second mom?

A. I took care of him, helped took care of him until he was two or three years old.

Q. How did that happen you took care of him when he was about two or three years old?

A. He was home with my mother, his grandmother, and everytime his mom went out or something and she left him with his grandmom I would take him out with me.

Q. When he was three years old, what happened that you didn't take care of him anymore?

A. Well, after that I go married and had a family of my own.

Q. Who was he then raised by for the most part?

A. His grandmother.

Q. Do you know how old David was when his grandmother died?

A. About 12 years old.

Q. About that time David went to where, if you know? When he was 12 years old, where he did go at that [M-111] point in time?

A. Well, he went off with his mother, got a place of her own he lived with her more for awhile.

Q. And you said you started to have children?

A. Yes.

Q. Approximately how many children did you have?

A. I had eight children.

Q. You said you had eight?

A. I lost one.

Q. Who was that?

A. Anetta Mae.

Q. When did you lose her?

A. It will be two years the third of next month.

Q. What did she die from?

A. Kidney infection.

Q. Did David know your children?

A. Yes, he did.

Q. Did he know Anetta Mae?

A. Yes. He loved her very much.

Q. Did he from your own knowledge make any offers to Anetta Mae?

[M-112] A. Well, from my daughter's knowledge he asked her on the phone conversation that he would give her one of his kidneys if she wanted him to.

Q. Did that ever happen?

A. No, because at the time my other daughter a year younger than Anetta was going through the test to have the test for her kidney.

Q. Obviously none of it worked because Anetta passed away?

A. She had two of them. Neither one of them worked.

Q. Would you visit David Dawson if he was in prison for the rest of his natural life?

A. Yes, I would if I had a way.

Q. Knowing all you know today and having sat here, do you still love him?

A. Yes, I do.

Q. Did David ever know his real father?

A. No, he didn't.

MR. OTLOWSKI: I have nothing further.

* * *

[M-113] BY MR. OTLOWSKI:

Q. You are Brenda Lintz; is that correct?

A. Yes.

Q. How old are you, Brenda?

A. I am 23.

Q. Are you married?

A. Yes, I am.

[M-114] Q. Do you have any children?

A. Yes, I have one son.

Q. What is your relationship to David Dawson?

A. He is my half brother.

Q. Do you remember David in your earlier years?

A. Yes, I do.

Q. How do you remember him? Did you live with him at anytime?

A. Yes, we used to live together down to Milford and we lived together in Willow Grove; Dover.

Q. At anytime were you David's playmate, so to speak?

A. Yes.

Q. Did you visit David while he was in prison?

A. Yes, I did.

Q. Approximately how many times did you visit David?

A. Two or three times a month.

Q. Do you know how far David went in school from your own knowledge?

A. Seventh grade, seventh or eighth grade.

Q. What happened that he only went to the seventh or eighth grade?

[M-115] A. That is when he started getting in trouble.

Q. Then where did he go?

A. I think he went to Ferris.

Q. After that he became involved in institutions; is that correct?

A. Yes.

Q. Do you know if David could read or write when he was in seventh grade?

A. That I know of he couldn't.

Q. Did it ever come to be that he did learn to read or write?

A. Yes.

Q. Brenda, you previously stated you visited him in prison; is that correct?

A. Yes, I did.

Q. Approximately how many times have you visited him to the best of your recollection?

A. What do you mean?

Q. Well, how many times per month do you go to visit him?

A. Two or three times a month.

Q. Could you describe what takes place or how you get into one of these visits?

[M-116] A. Yes. First you have to call between Monday and Saturday if you want to see someone in there on Sunday and if they are in maximum security you have to go – once you get the appointment, you have to go and sit at the main gate and you sit there until the main guard from maximum security comes over, collects your I.D. and checks you and then you are escorted from the main gate to maximum security in your car and then you have to go through two gates there and then you go and visit. They check you over with metal detectors and everything.

Q. And you follow the same procedure to leave; is that correct?

A. Well, as you leave you are escorted out.

Q. And you have done this at least two or three times a month?

A. Yes.

Q. Would you continue to do this if David was in prison?

A. Yes.

Q. Do you still love your brother at this point?

A. Yes.

MR. OTLOWSKI: If I may have one minute, [M-117] Your Honor?

THE COURT: You may.

(Pause.)

BY MR. OTLOWSKI:

Q. Brenda, was you mother here during the trial?

A. Yes.

Q. She hasn't testified; is that correct?

A. Yes.

Q. Do you know why she won't testify?

A. Yes.

Q. Is there any reason why she won't that you know of from your own knowledge?

A. She has just been through too much. She can't go through anymore.

Q. Are you presently pretty much the only family member that has kept in contact with your brother?

A. Yes.

Q. And did you in fact have any visits with him described as an honor visit?

A. Yes.

Q. What happens in an honor visit?

A. That is where when they are on good behavior [M-118] they are granted an hour visit and it is on a

Saturday and it is for like two hours where you have a picnic and you bring food and stuff.

Q. And you have done this?

A. Yes.

MR. OTLOWSKI: Your Honor, I have nothing further at this point.

* * *

[N-25] MR. WHARTON: Thank you, Your Honor. May it please the Court. Mr. Foreman, ladies and gentlemen of the jury. Once again I come before you and I want to express the appreciation of the State for your service as jurors. I don't think it is necessary to reiterate the comments made earlier about your service as jurors, but I do wish to extend our appreciation to you once more.

On December 1, 1986 four men broke out of the Delaware Correctional Center. They went through Mark McCoy's room, down a manhole, through a tunnel, up another manhole and outside of the fence. Three of them went north: Mark McCoy, Richard Irwin and Larry Nave, to Fieldsboro where they were spotted by Wilburt Dill and later picked up by Cathy Spence and you heard they continued their odyssey further north to New Castle County, eventually crossing the [N-26] country and being apprehended in Arizona or Utah.

One man, ladies and gentlemen, was separated from that group of four and he went west. He went west in Kent County and he ended up at the Seeney residence where he stole money, watches, a motorcycle jacket and he ended up at the Kisner residence sometime between 7:30 and approximately 8:00 o'clock in the morning where he accosted Marie Kisner, where he bound her hands behind her back, where he gagged her with a sock, where he put a nylon stocking around her neck, where he struck her in the head probably with a base of the trophy, where he stabbed and cut her in the torso a dozen times all for a few dollars she had in her purse and her car which he took to Milford where he got drunk, met some people, told them his name was Abaddon, described that that

very evening of the murder, described himself with that name he had taken to himself as representing one of Satan's disciples; left Milford, eventually ended up in a car near Lincoln where he was captured with the proceeds of both of those burglaries in his possession, blood matching Mrs. Kisner's on his clothing, the mate to the sock which was gagging her in his pocket in Milford. Her car was stolen with his fingerprints on objects inside.

When I told you at the beginning of this [N-27] trial there were two prongs to this case, two aspects to it, two things we were seeking in this case, I told you we were seeking the truth and we were seeking justice. By your verdicts Friday, you have demonstrated the truth of what I have just related to you. You have convicted David Dawson for the murder of Marie Kisner.

It is now time, ladies and gentlemen, that we focus on the second prong, that we focus on justice and what a just sentence would be for that murder, for that cold-blooded killing. Justice requires, ladies and gentlemen, that your verdict, your sentence have effect, that it mean something, that it mean something positive.

If you return a verdict which has the effect of requiring David Dawson to spend the rest of his life in jail because of how he has lived his life, because of his background, because of the last 20 years of his life, you will have the effect of doing virtually nothing, of sending him back to jail where he has spent most all of those last 20 years.

When you were chosen as jurors, you were chosen individually and each one of you came from out of this courtroom and went down the hallway and into the next

courtroom and placed your hand on the bible and you swore to [N-28] tell the truth and each of you was asked a question and that question was do you have any religious, conscientious or other opposition to the death penalty and each of you answered that question no. Implicit in that answer, ladies and gentlemen, was a promise that if the facts and the law warranted you could, you would vote to impose the death sentence.

Let's talk about the law, the law in this case. As you know, a person who is convicted of first degree murder may be sentenced to death if you find, first, the presence of one or more what are called statutory aggravating circumstances and that goes for the intentional first degree murder; that is true for the reckless first degree murder in the course of a felony; that is true for the criminally negligent first degree murder in the course of the serious felony; and it is also true for the murder caused or the death caused to facilitate an escape.

What are the statutory aggravating circumstances which are in this case? You have already found by your verdicts at least two of them and by implication a third. You only need to find one beyond a reasonable doubt. The first that the murder was committed in the course of robbery, you have found the defendant guilty of robbery, you [N-29] have found him guilty of felony murder during the commission of robbery. You have, ladies and gentlemen, found beyond a reasonable doubt the presence of the first aggravating, statutory, aggravating circumstance.

Another aggravating circumstance is that the murder was committed for pecuniary gain. Pecuniary gain means

obtaining money. In the robbery count, it was alleged that the defendant stole a car, keys to the car and money. You have the evidence that in his possession was a two dollar bill. You know Marie Kisner had two dollar bills in her purse. By implication, ladies and gentlemen, you have found the second statutory aggravating circumstance.

The third statutory aggravating circumstance is that the murder was committed in order to facilitate the commission or the furtherance of an escape. You have found the defendant guilty of murdering Marie Kisner in order to facilitate that escape. You have found beyond a reasonable doubt, ladies and gentlemen, on Friday the presence of that third statutory aggravating circumstance.

That gets us to the next step, that gets us to the next consideration. Having found the presence of at least one, and in this case three, statutory aggravating circumstances, you will then be requested to consider what [N-30] are called nonstatutory aggravating circumstances. They are not specifically delineated in the statute and they relate to a couple of things. They relate to the nature, circumstances of the crime and they relate to the character and propensities of the defendant.

One of these additional aggravating circumstances which relates to the nature and circumstances of the crime relates to the manner in which Marie Kisner was killed. Marie Kisner, ladies and gentlemen, never had a chance when that knife was plunged into her, cut her and stabbed her a dozen times, when she was struck in the head. She never had a chance. She was defenseless, ladies and gentlemen. Her hands were tied behind her back.

How could she fight back? How could she offer resistance?

The gag was tied tightly in her mouth. How could she scream for help? How could she even reason or talk her way out of that and who would hear her screams? The nylon was around her throat. What danger did she present to David Dawson that required him to kill her, that required her death? She was helpless; she was defenseless. That is a aggravating circumstance, ladies and gentlemen. That makes this different.

Another aggravating circumstance that [N-31] relates to the nature and circumstances of the crime the murder was unprovoked. It was unnecessary to accomplish whatever purpose it was designed to accomplish and it was senseless. Marie Kisner was in her home. She was getting ready to go to work. She was not someone who had engaged in a heated argument over some serious topic with David Dawson so that he had to leave that argument and go arm himself and then come back and seek revenge. She did nothing to provoke her own murder.

She was not someone who was involved in informing the authorities on criminal behavior so that she would be killed as a snitch. She did nothing. She was getting dressed for work. Totally unprovoked; totally innocent victim.

The murder was unnecessary. If you accept the proposition, ladies and gentlemen, which you have that this murder was in some way committed to facilitate one of these other felonys, ask yourself did that have to happen?

Could not he have stolen her car, taken her money without killing her? Did he have to stab her and cut her 12 times to get away to facilitate his escape?

Could not he have securely immobilized her, disconnected the phone and done just as well? Was it [N-32] necessary to tie her hands behind her back, gag her, beat her with the trophy base and then cut and stab her a dozen times so that she lay there on her own bed slowly dying as the blood collected in the heart and cardiac tamponade resulted?

That fact makes this case different. What was the sense in that, ladies and gentlemen? The utter senselessness, the utter inability to answer the question why makes this case different. That is an aggravating circumstance. The nature and circumstances of the crime are aggravated. They require the death penalty.

But let's look at the defendant because one of the other things you are to focus upon, ladies and gentlemen, is the character and propensities of the accused. Well, we know that at an early age he was sent to a juvenile correctional facility, seventh grade about the age of 13. He resisted the efforts of the juvenile authorities at reform, at rehabilitation, the amenability hearing, the order that declared him nonameanable [sic] to the Family Court processes. All the usual correctional treatment alternatives have been utilized unsuccessfully by Family Court including probationary services, counseling, detention, and at least five commitments or recommitments to the Division of Juvenile Corrections dating from October, 1968. This order was dated [N-33] in 1973. The most recent one to that date is December 22, 1972.

The Family Court simply quit. They could not do anything with him. He was too bad for them to help. The State of Delaware would best be protected if the juvenile defendant was to be made a useful member of society by some other form of correctional treatment which the Family Court lacks power to assign especially as evidence by three separate recorded acts of delinquency of escape – there is that word: Escape – from maximum security institutions of juvenile corrections within the last one and a half years of institutionalization of said juvenile defendant.

They tried everything when he was a juvenile and nothing worked. So he went to adult prison. What do we know about his adult record?

Well, we know that he was convicted of grand larceny in 1973, grand larceny again and a third count of grand larceny, felony theft in 1977, felony theft in 1978, felony theft, misdemeanor theft, misdemeanor receiving stolen property, three counts of leaving the scene of an accident in 1978, burglary second degree in 1979, theft felony 1979, possession of a hypodermic needle and syringe 1980, carrying concealed deadly weapon 1980, escape second degree – there [N-34] is that word again: Escape – 1983, carrying concealed deadly weapon, refusing to be fingerprinted 1984, escape after conviction, conspiracy second degree 1987, and to backtrack escape after conviction in 1975.

Ever since 1978 he is supposed to have been incarcerated. The only time he is supposed to have been out of jail, the only time he was ever out of jail since 1978 is when he escaped each time. So what does that tell you,

ladies and gentlemen, when we go through some of these crimes?

Possession of hypodermic needle and syringe, 1980. Where was he supposed to be? Carrying concealed deadly weapon, 1980. Where did that happen? Escape second degree, another prison crime. Carrying concealed deadly weapon; refusing to be fingerprinted, 1984. Where did that happen? Where was he supposed to be? Escape after conviction and conspiracy, 1987. Weapons in jail; escape from jail. There are some 13, 14 felony convictions in that list, ladies and gentlemen.

Law abiding citizens will be horrified of one felony conviction on their records. 13 or 14 felony convictions since 1973, not including the additional 13 convictions you returned Friday, what does that say about the [N-35] character, propensities of the defendant?

Ladies and gentlemen, when you think and look at this exhibit State's Exhibit 79 in 1973 when you know he is in custody in juvenile facilities before that, but when he is transferred to adult facilities in 1973 since then to date you add up the times in here there is some three or four months in those 15 years that he has not be [sic] incarcerated, that he does not deserve to be incarcerated, that he was not in jail, and when you subtract the time he was illegally out of jail you have somewhere around nine months in those 15 years. What does that say about how he has chosen to live his life, about how he has chosen to become a habitual criminal? What does that say about a man's future if past behavior is any predictor of future conduct? Ladies and gentlemen, David Dawson is doing a life sentence on the installment plan.

What was he going to do with his life even if he never killed Madeline Kisner? Where would you expect him to spend the rest of it? In and out of correctional institutions since the age of 13 over the last 20 years. What expectation is there, ladies and gentlemen, that the future would be any different?

What expectation is there, ladies and [N-36] gentlemen, that he would cease, he would cease trying to escape? Three separate recorded acts of delinquency of escape from maximum security institutions of juvenile corrections. That is as a juvenile.

1975 escape after conviction. That was the four month, three or four month furlough – excuse me, that was not that. 1975 escape after conviction that was the one day escape.

The other escape second degree that was the four month furlough. 1986 he had the escape in this case. When they say life in prison without probation, parole or other reduction, it doesn't say without possibility or attempt to escape.

How has he done in prison? Has he reformed? Has he taken advantage of programs to make himself better so he can become an useful member of society? What can you say about him? Let's look at his conduct record. Beginning in 1973, '74, '75, '76, '77, '78, '79, '80, '81, '83, '85, '86, '87 – after this incident happened – '87, still conduct violations. '88, the last one with the decision confined to quarters, February. By my rough count – you can count them up yourself – some 24 conduct violations resulting in sanctions against him as an inmate.

[N-37] Another measure of how successful an inmate might be: Parole. Six times before the parole board; six times he was not safe to put out on the street. Denied, denied, denied, denied, denied, denied.

The character and propensities of the defendant. We introduced evidence to you, ladies and gentlemen, about other things which go directly to his character and propensities. The Aryan Brotherhood is a white racist prison gang. What does that tell you about David Dawson? It is not just a casual association. He has branded himself with his tattoo Aryan Brotherhood.

Could have joined the JC's in prison. Could have gotten his GED. Could have done something good. What does he become? An Aryan brother. What does that say about his character and propensities?

He has taken the name Abaddon. We didn't tell you that because necessarily, or even for any religious reason, but it tells you something about what Abaddon means: The angle of the bottomless pit, one of Satan's disciples. What does that say about how he views himself, how he would like to be seen by other people? What purpose could there be in calling himself the angle of the bottomless pit, Abaddon, other than to tell people you better watch out for me. I am [N-38] bad.

This is not just a passing fancy, a fad, a phase in his life. It is a direction his life has turned. It is not just a nickname he goes by. He has marred his body with that tattoo: Abaddon. He is serious about this, ladies and gentlemen. All the way across his stomach A B A D D O N in block letters the high (indicating). He relishes that

connotation, that impression of evil: The angle of the bottomless pit.

Those are the nonstatutory aggravating circumstances, ladies and gentlemen. Those are other reasons why – those are the character, they reflect the character, the propensities of David Francis Dawson. They tell you what type of person he is.

They also call out for the death penalty and what is in response to that? What are you to way [sic] in balancing these statutory aggravating circumstances, these nonstatutory aggravating circumstances dealing with the nature and circumstances of the crime and the character and propensities of the defendant? What are you to weigh against all of that?

Well, he has earned some good time credits in jail. He has gone to AA a few times and if he keeps [N-39] earning some good time maybe he can have a few picnics with his relatives. He has an aunt that is willing to testify for him and a half sister that still loves him.

How do those meritorious good time credits stack up against the bad conduct, the felony convictions? Where is going to AA compare with proclaiming yourself an Aryan brother? Where does abstinence of alcohol, where does temperance range in his list of priorities compared to associating himself with a racist gang?

What does that tell you about the significance of those mitigating circumstances? Where do the few picnics at the prison, how do they weigh against his repeated escapes and his weapon charges in jail?

Where does the love of half sister who sees him two or three times a month weigh against the real David Dawson who 7 days a week, 35 weeks a year is Aryan brother David Dawson, is Abaddon?

You will be required to balance those things, ladies and gentlemen, those aggravating statutory and nonstatutory circumstances against those mitigating circumstances and if you find the aggravating circumstances, all of them, outweigh the mitigating circumstances – you will be requested to answer that on one of the questions on [N-40] the form that will be sent to you and that gets us to the final step.

That gets us to the final step and that is which penalty is appropriate? What will the sentence be? Will you all unanimously vote for the death penalty or not because if you don't, not each and everyone of you votes for the death penalty, he will not receive it. Each and everyone of you, a jury of 12 unanimously together, must vote for that punishment.

You will hear from the defense in summation and as you do keep in mind a couple of questions as the lawyer for Mr. Dawson speaks to you. Keep in mind a couple of things. Is his argument simply a generalized across the board argument against the death penalty? Does it relate even to this case? And if you find it to be simply an anti-death penalty generalized speech, consider these things, ladies and gentlemen.

You have sworn that you are not opposed to the death penalty and by implication the necessary import of that is you can impose it when the facts and evidence so

warrant it. You should reject that generalized anti-death penalty appeal if there is one.

The statute in Delaware permits the death [N-41] penalty. It is the law that the death penalty is permissible in certain cases where there is a statutory aggravating circumstance or all the aggravating circumstances outweigh the mitigating circumstances. You may impose the death penalty. So a generalized anti-death penalty speech to you you should reject because the law says you can impose the death penalty.

David Dawson himself needs to be tied into this argument in some fashion and as you hear argument against the death penalty say where does David Dawson come into this? Why should he be spared after what he did and who he is?

You may hear argument along the lines of he has been in trouble all his life. Society made him what he is. He has been institutionalized since 13. He has a future in jail. He will never get out of jail.

Ladies and gentlemen, David Dawson made himself what he is. Society tried. The juvenile authorities tried. He made himself what he is. He committed each and every one of those crimes in his past because he chose to. What is his future? Will he ever get out of jail? Not legally.

Which is more significant, ladies and [N-42] gentlemen? The fact he brutually [sic] murdered Marie Kisner and has spent a lifetime as a criminal or that he has two relative who don't want him to die? Nobody made him

kill Marie Kisner. He choose [sic] to do that himself. He is responsible for his own actions.

Did he tie her up because somebody sent him to reform school at the age of 13? Did he gag her because he committed some thefts when he was 18 or 17? Did he stab her repeatedly and cut her because he has possessed weapons in jail and has been incarcerated the better part of the last 15 years or does that argument put the cart before the horse?

Ladies and gentlemen, sometime in the future, perhaps many times in the future, you will think back on this case and you may even talk to each other about it. When you look back on the case, you will recall the people who came in here and testified and you will recall some of the evidence you have seen: the clothing, the photographs. You will recall perhaps Wilburt Dill who saw three men running around Fieldsboro between quarter of 6:00 and quarter of 7:00 in the morning and Cathy Spence, perhaps, who picked them up. And Patty Dennis you might remember as the woman who met David Dawson that night shuffling between bars.

You might remember some of the police [N-43] officers who collected evidence and maybe some of the FBI agents who did scientific analysis that linked David Dawson to this murder: The sock, the blood, the fibers. And Russell McNatt you might recall who identified David Dawson's fingerprints in Marie Kisner's car. And Richard Kisner you might remember him as he took the witness stand and told you about the events of that morning and

you might remember squirming during the cross-examination of Brian Kisner and all that was implicit in that questioning.

Although you never saw her except in death, you will remember Marie Kisner and how she died and you will certainly remember the man sitting there (indicating) David Dawson, the man who murdered her. And when you think back on this case and what you did, you should think back confidently that you did the right thing, that you did justice. Justice requires, ladies and gentlemen, that you do something. It requires that you make a difference even if it is only in David Dawson's life.

Ladies and gentlemen, justice requires that you do something besides just send David Dawson back to prison again. Do something besides just send him home. Justice requires, ladies and gentlemen, that each and everyone of you together as one jury vote for the death [N-44] penalty. Thank you.

* * *

MR. SWIERZBINSKI: Please the Court. Ladies and gentlemen of the jury standing before you right now is one of the most difficult things I have ever had to do in my [N-47] entire life.

When I came down to breakfast this morning, my wife said how do you feel? I told her on Friday that the people told me they didn't buy my argument. Today I have to go down there before those same people and beg for mercy. People don't like to beg for mercy because it is considered demeaning. It is considered lowering.

When I represent a client who has been injured in a automobile accident, I try to settle the case with the insurance company. I don't beg. If we can't get what we want, I say we will see you in court. When I represent someone who wants to buy a piece of real estate and try to negotiate with the seller and if that doesn't work, we say thank you very much and we try to buy something else.

Ladies and gentlemen, a death penalty murder case is a case like no other in the legal system. Because I have the responsibility of advocating David Dawson's position, I will eat my pride if I have to and I will beg today. I will beg you to spare his life because basic assumptions in a death penalty murder case are different at least from the defense perspective and assumption number one is that all life is sacred and all life is worth sparing.

Even that assumption has a flaw to it [N-46] because when you made your verdict and returned it on Friday, it was obvious that you made a decision that the defendant did not respect the life of Madeline Kisner and I respect

your verdict. It doesn't make my [sic] happy, but I respect it.

Ladies and gentlemen, I would suggest to you that two wrongs don't make a right. You found that David Dawson killed Madeline Kisner, but I would suggest to you that should not justify killing David Dawson.

We are in a time when there is a great gate or great awakening about the sacredness of life. We have pro lifers on one hand who are anti-abortion. They are not only anti-abortion, but they are in favor of kindness to those who are maimed or crippled. They are the same people who are also against euthanasia for the elderly or disabled.

We have people today who are opposed to killing animals for their furs. We have people today who are opposed to killing animals because their ground up by-products are used in such things as ladies cosmetics and things we use around the home and then we have conservationists who have laws passed to protect such species as whales, eels and even man-eaters such as crocodiles and alligators and despite all that there are laws which our Delaware law says that the jury can impose a death penalty [N-47] and take another human being's life. Sometimes when we defense counsel try to balance all that out, we find that difficult.

When Judge Ridgely charges you, he will tell you about the peculiar nature of the proceeding that we have here today and yesterday. You will be told about the aggravating circumstances, the mitigating circumstances and then what you will do. You will be told basically that you must make some balance between the aggravating

and mitigating and then you will make a decision in terms of what your sentence should be.

I ask that you pay particular attention to the Judge's instructions because you are not, ladies and gentlemen, under any circumstance compelled to return a verdict of death. You may do your analysis in the jury room and you may find there are aggravating circumstances and in fact his Honor will instruct you that there are aggravating circumstances which have been proved by your verdicts on Friday and when you do the weighing and balancing you may find that the aggravating circumstances outweigh the mitigating.

But, ladies and gentlemen, the law of this State is even if you so find you may for reasons known to [N-48] yourself decide that you are not going to impose a death penalty. You have that right. There is no set of circumstances which exist which will require you to return a verdict of death.

In order for you to return a verdict of death, each and everyone of you must agree that death is the appropriate penalty. We are not in a situation where we were last week where you had to decide 12/0 in favor of a verdict. If there is one of you on that panel who says that for whatever reason David Dawson's life is worth sparing, then his life will be spared. Your verdict need not be unanimous. I think it is important to keep that in mind.

When we closed on Thursday, one of my last comments was I commended David Dawson's life to your hands and the State told you on rebuttal that is really not so because David Dawson has taken action during his lifetime, he has made conscious decisions to do certain

things, but, ladies and gentlemen, you can't get off the hook that easily today even if you assume the State's argument on that point was correct because by your verdict on Friday you have already determined that at the minimum David Dawson will spend the rest of his life in jail without probation, without parole, without ever getting out and basically in order for [N-49] you to impose a death penalty you have to go one step further and you must take affirmative action. You must make a decision all 12 of you, that he should die in order to impose a death penalty.

That argument that the State made to you on Friday does not apply today because the State needs you to be the instrumentality for imposing a death sentence. I would suggest to you under the circumstances you are not required to do that. You have the right to listen to your own individual conscience and vote for life if you so choose.

Now, you found on Friday that David Dawson did a series of things which were in violation of the law and because of those series of things he should be punished, but, ladies and gentlemen, we would suggest to you that if you really want to punish David Dawson you might want to consider life imprisonment.

Consider for the fact his age. You were told yesterday he was 33 and consider the fact what you would know about mortality tables. You don't have to have one in front of you, but common sense will tell you that based on mortality tables David Dawson has a lot of years to live based on that mortality table. If you want to punish David Dawson, ladies and gentlemen, keep him in jail for

the rest [N-50] of his life. Keep him in jail so he will rot there and think about the things that he did.

Keep him locked up in that cell where he can think every morning and every night whether he lives one day or a hundred years in terms of not only what he did on December 1st of '86, but what he did before that. Let him think about that and let him realize that no matter what the occasion, whether it is Christmas, vacation, 4th of July, special days people like to enjoy, never ever is he going to see the light of day and enjoy those freedoms. Think about that. Think about that.

There was a good deal made at this penalty hearing concerning David Dawson's membership in the Aryan Brotherhood and the term Abaddon. I would suggest to you that in making your decision you should give these terms, these inflammatory terms absolutely no weight.

In this country we are a people of laws and under those laws we have certain rights which include the right to freedom of speech, freedom of thought, freedom to do a number of things, but, ladies and gentlemen, if any of you know anything about political science or American government you know there is no such thing as absolute freedom.

Let me give you an example. A person goes [N-51] to a crowded movie theater and he knows that in that theater or at home, on the job or wherever, he has the freedom of speech, but if in that movie theater he decides to stand up and holler fire where there is no fire and if he causes a stampede and someone is injured or even worse killed he has abused his freedom and he has also committed a crime, but if he has thoughts, if he has thoughts

about white supremacy and if he doesn't do anything about it, ladies and gentlemen, what is the harm?

If he has thoughts and if he considers himself Abaddon and assuming you accepted that definition that you heard yesterday, if he doesn't act on that so what? Where is the harm?

In the 60s and 70s this country went through an acute wrenching experience with the Vietnam situation. It was a situation that ended up pitting a lot of times father against son, family against family, and one of the things that we as a society should have learned from that experience was the fact that people should be tolerant of other people's opinions. You don't have to like what someone says, but you should be willing to sit down and listen.

You may find it personally offensive that David Dawson is an Aryan brother and a white supremacist and [N-52] if you accept the definition of Abaddon you may find that personally offensive that he takes that name and you may find it personally offensive that he has Aryan Brotherhood and Abaddon tattooed on his person, but so what? Has the State produced any evidence whatsoever that because he is an Aryan brother or because of Abaddon he has incited any disturbances where he has been housed at the Delaware Correctional Center? Has the State done that? Has the State shown you any evidence that because he may be Abaddon, if you accept that, that he has done anything wrong?

Let's go back to that packed movie theater for a minute. Now, we have that person, ladies and gentlemen, in that theater and that person shouts fire. Do you think the people in that theater would be better off if they had

an Aryan brother in that audience who kept his mouth shut or do you think they would have been better off if that person who hollers fire falsely is a flag waving American citizen? You might not like and you might find it personally distasteful that he is what the State says he is, but if he thinks it, if he believes it, but if he doesn't do anything about it, where is the harm?

Should you put someone to death because of what he believes? Can you in good conscience say, yes, this [N-53] man is entitled to the death penalty because he is a white supremacist or because he supposedly told someone he is Satan's disciple? Think about that. Think about the circumstances under which he told Patty Dennis if you accept her testimony, that he was Satan's disciple.

What did she say yesterday? She told you, and I tried to write it down word for word at the time when she said this, I wasn't real drunk then. Is Patty Dennis totally sober when David Dawson said this? Was David Dawson totally sober?

We don't know his condition at the time when this was said, but we do know shortly after this was said the parties apparently went to the Hide-A-Way, spent some time there, came back to the Zoo Bar and as soon as the defendant walked into the Zoo Bar he was turned out and the officer saw him – if you believe the officer – coming out staggering which would certainly indicate, ladies and gentlemen, that he was drunk. So if he were drunk, knowing what we know about people who drink too much, can you say that when David Dawson said this – if he said it – he was implying that he in fact was Satan's

disciple seriously or was it said in jest or was it said under the influence of alcohol? But you don't know.

I am not going to get up here and tell you [N-54] the defendant is where he is in his life because he didn't have a chance. I am not going to tell you defendant doesn't have a bad criminal record. I am not going to tell you that he hasn't been a disciplinary problem at DCC, but consider if you would even the disciplinary problems that the State introduced into evidence. Consider the fact we don't know why those events occurred other than I think for the first one or two.

The first one the State told you – not the State, Miss Guessford told you in answer to Mr. Butler's question was because David Dawson disobeyed an order, but if you look at most of those punishments most of those punishments, ladies and gentlemen, were lose [sic] of privileges for about 24 hours or a time not much more than that. He violated rules absolutely, but the fact, ladies and gentlemen, that he has violated rules at DCC does that mean you should put him to death?

If you take a look at that criminal record, ladies and gentlemen, you are going to notice defendant is a thief. Look at all the convictions, guilty pleas, whatever – guilty plea is the same as a conviction – which are convictions for theft, theft. Under the old statute, we used to call it grand larceny. He is a thief and he has a [N-55] terrible record for being a thief, but the fact that he is a thief does that mean, ladies and gentlemen, that he should pay the ultimate penalty?

He doesn't have a record for violence. If you don't believe that, I will defer to your judgment. Take a look at

the judgments, convictions, the certified copies, et cetera. Take a look at them. See what you find.

At a time like this I turned to the bible to see if I could find any words of wisdom that I could give you. Truthfully, there is not much guidance from the bible because if you read the bible the bible is a pretty tough document and if I say to you vengeance is mine says the Lord, State can come back and tell you that is true, but it also says an eye for an eye and a tooth for a tooth.

MR. BUTLER: Your Honor, may we approach briefly?

THE COURT: You may. Court reporter will come forward.

* * *

THE COURT: You may continue.

[N-58] MR. SWIERZBINSKI: Thank you, Your Honor. In trying to put this matter in perspective, Ray Otlowski and I when we sat down and we talked about it thought the best way to show some characteristics of the defendant which you could understand, some characteristics that you could latch onto and feel, were to call David Dawson's family. That is [N-59] why we did that yesterday.

It is important to call the family because, ladies and gentlemen, I am not going to deny the fact they haven't seen him in a long time because he has been incarcerated. I am not going to tell you they lived in David Dawson's presence for months and years, but they do see him and the reason that they see him is because, ladies and gentlemen, no matter what he has done, no matter how many

people he has hurt in the past, there is love there and if you were watching the testimony yesterday Brenda Lintz and her aunt, if you observed, there was even love flowing from David Dawson yesterday because if you watched at counsel table you could perceive –

MR. BUTLER: Your Honor, may we approach?

THE COURT: You may. Court reporter will come forward:

* * *

[N-60] THE COURT: The objection is sustained.

* * *

[N-61] MR. SWIERZBINSKI: Thank you, Your Honor. I ask you, ladies and gentlemen, to consider the testimony that you heard yesterday. Two people were on the witness stand, relatives who indicated in no uncertain terms that they loved David Dawson.

There was the testimony from Mrs. Hickman that defendant sometime in the past offered to donate his kidney to her daughter. It wasn't something the defendant had to do. It was something that he did. The fact it wasn't accepted is not David Dawson's fault.

But it is evident, ladies and gentlemen, that despite the fact this man has committed a series of crimes, despite the fact he has done all the things he has done in his life, that there is some good in him and it is not your job when you go back to the jury room and say well, we have this piece of good here, we have these bad things over here, and you don't have to say in terms of numbers how much this equates.

Sure, you have to do balancing. You have to weigh the aggravating versus the mitigating circumstances, but you have a person, ladies and gentlemen, who has some good in him and you have to give it some weight. I can't translate that into a mathematical formula, but it is [N-62] something that you should consider.

The State makes light of defendant's Form 543 in terms of what he has done in the institution, but it is evidence, ladies and gentlemen, that he is not just sitting in prison lying around doing nothing. It indicates that he has had various jobs there, he has made some attempts to do certain things to at least improve his life. He is not just merely sitting there letting time pass him by and you have to judge how much that is worth.

When you make your decision, you have to listen to your conscience, but I would suggest to you that when you look at all the evidence you do so with a positive attitude. You can look at the evidence in the pro life sense and say to yourselves this individual should live. You don't have to take the negative approach and condemn him to death. He is an individual. He has a family. He is never going to enjoy the family, but there are people out there who care for him and we would suggest to you that there is a reason for his life to be spared.

I would point out to you that when you go back to deliberate you have to keep in mind not all 12 of you have to vote for life. There only needs to be one. In order for you to impose a death sentence, all 12 of you must agree, [N-63] all 12 of you must agree that there are aggravating circumstances that outweigh the mitigating and you must agree after doing that balancing that you

unanimously agree with death. I would suggest to you that if there is one of you who can be positive, if there is one of you who can vote for life, we ask you to do that. We beg you to do that.

Don't let this tragedy be compounded. If there is one among you, please stand up in that jury room and let your presence be seen and we thank you for your attention.

THE COURT: Mr. Butler?

MR. BUTLER: Thank you, Your Honor. Ladies and gentlemen, let me begin by telling you I have two pieces of good news for you. First of all, I am the last lawyer you are going to have to hear from until the next time you are here, come back for jury service and, secondly, I am not going to take very long.

Ladies and gentlemen, I am speaking in rebuttal; that is, I am speaking solely to the comments made by Mr. Swierzbinski. I am not going to introduce new elements, new arguments. I am not – I may restate a few things and whatnot, but I want you and I together to focus on the arguments that were raised by Mr. Swierzbinski and one of [N-64] the first arguments made is a little troubling because it is really not right because he told us the story about waking up and seeing his wife and said he was going to come down here and beg for mercy.

Separate these two, ladies and gentlemen. That is the defendant over there (indicating). Mr. Swierzbinski doesn't need mercy. He is going to be back and go back to his real estate settlements when this case is over. He is going to beg for mercy for his client, the defendant, the murderer, not himself.

That is sort of an old gimmick: Identify yourself, the spokesman, with your client; try to get the jury to identify with you and thereby to your client and thereby get the jury's sympathies for you and your client together. Remember, Mr. Swierzbinski is but a mouthpiece for the defendant.

Mr. Swierzbinski says that if I have to I will beg you to spare his life. Again, that is a personal invective; that is, I will beg you to spare his life. Not the evidence suggests that his life should be spared, not that you should rely upon the evidence that points to some sympathy for the defendant, but I will beg you to spare his life. That is not appropriate. Is it anymore appropriate [N-65] for me to stand here and beg you to impose the death penalty? No.

Mr. Swierzbinski's first argument discussed assumption number one that all life is sacred and worth sparing and admitted that that is flawed in this case because the defendant disagrees with assumption number one and he talked about people today who oppose killing animals, who are opposed to euthanasia, opposed to abortion, opposed to killing eels and alligators and so forth. Well, guess what, ladies and gentlemen? It wasn't just in the last 10 years that people were opposed to the senseless, wanton, intentional, snuffing out of human life by all accounts for the sport of it. They have been opposed to that for a long time.

There was another theme running through Mr. Swierzbinski's arguments. He says if one of you, if but one of you will come forward and vote against the death penalty then the death penalty will not be imposed. Don't surrender your entrenched beliefs. Listen to what your other jurors suggest to you and tell you. Listen to the arguments of the other jurors as you sit in the jury room, but this is not a magic show where you look for a volunteer from the audience. Okay.

[N-66] You don't – this isn't Rocky. You don't have to feel like well, Mr. Swierzbinski needs just one of us; I will be the one. Not because the evidence supports it, not because the arguments are persuasive, but because I am just that kind of person. I volunteer. Be guided by the evidence. Be guided by the law.

Mr. Swierzbinski says the defendant will spend the rest of his life in jail without probation or parole. What about escape? Three as adult, three as a juvenile.

Mr. Swierzbinski says if you really want to punish the defendant give him life in prison because he is 33 and he has all this time to sit and think about the enormity of this crime. First of all, what good does that do to anybody? What does that accomplish? Nothing.

Second of all, what evidence is there that the defendant is going to think about anything except another tattoo? None. And he accuses the State of having introduced inflammatory terms in this case: The Aryan Brotherhood and Abaddon. And he says well, if he has these thoughts, what's the harm?

We are not required, ladies and gentlemen, to show there is another harm in the word Abaddon. It [N-67] doesn't even make sense that there is. Obviously there isn't. If he wants to call himself Abaddon, fine. If he wants to join the Aryan Brotherhood, fine. If he wants to join the JC's fine.

You can bet if he joined the JC's you would have heard about that in mitigation. You can bet if he joined the Kiwanis Club you would have heard about that in

mitigation because it reflects upon the defendant's character. It tells us something about him.

And what did Patty Dennis tell us about? It tells us something about the defendant that within 12 hours of this crime, of this brutal murder, he is describing himself to a complete stranger as one of Satan's disciples. It tells us something. Not that there is some harm in it, but we are looking at the character of the defendant. Certainly what he is thinking about doesn't matter, but what does it mean?

Do you think he was kidding Patty Dennis when he told her he was one of Satan's disciples? We know what the dictionary definition of Abaddon is.

And then Mr. Swierzbinski says that he is not going to tell you the defendant doesn't have a bad criminal record and then he goes ahead and tells you the [N-68] defendant doesn't have a bad criminal record because it is all thefts overlooking, ladies and gentlemen, carrying concealed deadly weapon while in prison, burglary, and escape. He is just a thief. He is an escaping thief. He carries weapons of some kind in prison, but he is just a thief.

He is not here to be sentenced as a thief. Mr. Swierzbinski says are you going to put him to death because he is a thief? Of course not. Theft isn't a capital offense.

And then he says well, I am not going to tell you the defendant doesn't have a disciplinary problem while in prison; then he goes forward and points to the disciplinary record and says it is not so bad. How bad does it have

to get ladies and gentlemen? How bad does it have to be? What can you reasonably expect of a life sentence for the defendant? What can you reasonably expect of his behavior? He is still collecting conduct violations after this offense.

Remember something, ladies and gentlemen. Mr. Swierzbinski began to talk about the bible. This is not a church. This is a court of law. Your deliberations should be guided by the evidence and by the law, not by the bible.

[N-69] He is to be judged here by the laws of man.

Mr. Swierzbinski says that no matter what the defendant has done and no matter what he has done to others there is still love in this family. Well, ladies and gentlemen, that cuts a lot of different ways because you know from the testimony in this case that there was love in the Kisner family, too. Where does that really get the defense?

Madeline Kisner is no longer with us. Brian cannot share her love and neither can Richard.

THE COURT: Counsel come to side bar. Court reporter will come forward.

* * *

[N-70] THE COURT: Members of jury, I will be [N-71] giving you shortly detailed instructions on the law; however, I want to remind you at this time that what I will be saying and that is that your focus must be upon the details of the commission of the offense and the character and propensities of the offender, not upon the impact this crime may have had upon the victim's family.

You may continue.

MR. BUTLER: Ladies and gentlemen, I said that merely to indicate that there are two sides to the story.

Ladies and gentlemen, we don't make light of the defendant's Form 543 indicating that he received good time credits because he went to Alcoholics Anonymous and Green Tree program and so forth, but remember what Miss Guessford told us about those reports.

For every month you participate in Alcoholics Anonymous or Green Tree or whatever or work extra time or whatever, every month you participate in that you get five days off your sentence. So that for each month, each year, you get – 12 times 5 – you get 60 days. That is two months off your sentence for each year that you participate, all 12 months, in the programs. She told us Alcoholics Anonymous is available to people throughout. The program [N-72] doesn't end, it doesn't stop. You can keep on earning these credits as long as you are in Alcoholic Anonymous.

Then look at Form 543. Defendant goes a long time without collecting any credits. This isn't just good to Alcoholic's Anonymous because you want to be a recovered alcoholic. This is a ticket out. This is a ticket out of prison. You don't have to believe a thing about the program. All you have to do is be there and you get these credits. It is a ticket out of prison and the defendant didn't utilize it for long periods of time. What does that tell you? Where does he want to be? Where is his home? Where is his home?

Thirty-three years ago David Dawson's mother had a child and when the child was born it was full of promise and unfulfilled potentials and just like anyone else people choose careers, they choose jobs, they choose lifestyles. David Dawson's choices bring him before you today to be sentenced for the murder of Madeline Marie Kisner.

One of the corner stones of American life is the freedom to make those choices. One of the corner stones of American life is the responsibility for the choices you make. David Dawson was not forced to make the choices that [N-73] he made. He wasn't forced to be in and out of juvenile corrections facilities. He wasn't forced to adopt the name Abaddon. He wasn't forced to join the Aryan Brotherhood. He choose to do so.

He wasn't forced to escape on December 1, 1986. It was his choice. He wasn't forced to tie Madeline Marie Kisner up. He chose to tie her up. He wasn't forced to gag her with a sock. He chose to do so. He wasn't forced to stab her 12 times. He chose to do so.

You, ladies and gentlemen of the jury, have the choice not to go to work on Monday. You can call in sick even though you are not sick, but if the boss finds out you have to take responsibility for your choice. David Dawson chose to murder Madeline Kisner. He can't avoid responsibility for that.

Ladies and gentlemen, you have a choice, too: Life or death. Mr. Wharton suggested to you, and I will reiterate, the defendant was already doing life in prison on the installment plan admittedly, but he was already doing life in prison. That is where he had been since 1973 except for

some momentary episodes out of prison while he collected new felony arrests, but he was already destined for life in prison before he murdered Madeline Kisner.

[N-74] Madeline Kisner's death was senseless. We have already talked about that. The defendant either way is going to die in prison unless he escapes. Make his death have some meaning and it will mean something if it comes as a result of your verdicts. Put this case into perspective and make something have meaning.

You can't bring Brian's mother back to life, but you can demand the full measure of responsibility for her killer and you can deny to the defendant his requested sympathies just as he showed none in this case.

Ladies and gentlemen, you can do justice and that is all we ask. Thank you.

* * *

[N-77] An aggravating circumstance is any factor relating to the crime or to the offender which tends to make the defendant's conduct more serious or the imposition of a penalty of death appropriate including, but not limited to, any statutory aggravating circumstance. A mitigating circumstance is any factor relating to the crime or to the offender which tends to make the defendant's conduct less serious or the imposition of a penalty of death inappropriate.

It is your sole province as the jury to determine the aggravating and mitigating circumstances which exist in this case and the weight they should be individually [N-78] accorded

* * *

[N-81] In weighing the aggravating and mitigating circumstances, it is not a question of mere numbers of each, but rather the relative weight of each as compared to the other. In order to recommend a sentence of death, you must unanimously find that the aggravating factors outweigh the mitigating factors. Regardless of the circumstances, you in your discretion may recommend that a sentence of life imprisonment without probation or parole be imposed.

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE

[Caption Omitted In Printing]

* * *

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between Ferris W. Wharton, Esquire, and Charles E. Butler, Esquire, Attorneys for the State, and Paul S. Swierzbinski, Esquire, and Raymond J. Otlowski, Esquire, Attorneys for the Defendant, as follows:

The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.

/s/ F W W
FERRIS W. WHARTON, Esquire

/s/ Charles E. Butler
CHARLES E. BUTLER, Esquire

/s/ Paul S. Swierzbinski
PAUL S. SWIERZBINSKI
Esquire

/s/ Raymond J. Otlowski
RAYMOND J. OTLOWSKI,
Esquire

DATED: June 27, 1988

[State's Exhibit 87]

IN THE SUPERIOR COURT FOR THE
STATE OF DELAWARE
IN AND FOR KENT COUNTY

[Caption Omitted In Printing]

Penalty Hearing Report

The Trial Judge in this case, in which the defendant was indicted for murder in the first degree and thereafter, in accordance with 11 *Del. C.* § 4209, a penalty hearing was held, herewith submits this report based upon the record in the case and data prepared by the Presentence Office.

Sentence Imposed: Death Sentencing Orders Attached. (See Attachment A)

* * *

F. General Considerations

1. Was race raised by defendant as an issue at trial? Yes [ ] No [X]

2. Did race otherwise appear as an issue at trial? Yes [ ] No [X]

3. What percentage of the population of the County is the same race as defendant?

   (a) Under 10% [ ] (b) 10 to 25% [ ] (c) 25 to 50% [ ]

   (d) 50 to 75% [ ] (e) 75 to 90% [X] (f) Over 90% [ ]

4. Were members of defendant's race represented on the jury? Yes [X] No [ ]

5. Was the jury instructed to exclude race as an issue?
Yes [ ] No [X]

* * *

IN THE SUPREME COURT OF THE
STATE OF DELAWARE

DAVID F. DAWSON,	§	
Defendant Below, Appellant,	§	No. 300, 1988
v.	§	Court Below Superior Court of the State of Delaware, in and for Kent County Cr.A. Nos. IK86-12-0024, IN87-01-0841, IK87-01-0843, and IK87-01-0845
STATE OF DELAWARE,	§	
Plaintiff Below, Appellee.	§	

Decided: October 4, 1990

HOLLAND, Justice:

Following a jury trial in the Superior Court, in and for Kent County, the defendant-appellant, David F. Dawson ("Dawson"), was convicted of four counts of Murder in the First Degree, six counts of Possession of a Deadly Weapon During the Commission of a Felony, Robbery in the First Degree, Burglary in the Second Degree, and Possession of a Deadly Weapon by a Prohibited Person.[1] On June 28, 1988, after a two-day penalty hearing, the jury unanimously recommended a sentence of death for Dawson on each of the four counts of Murder in the First Degree.

---

[1] Dawson was indicted by the grand jury of Kent County on January 5, 1987. All fifteen counts of the indictment related to events occurring on December 1, 1986. Two counts of the indictment charged Dawson with Burglary in the First Degree and Misdemeanor Theft at the home of Frank and Dorothy Seeney, in the general vicinity of the murder scene. Dawson entered a guilty plea as to these two counts, but proceeded to trial on the other thirteen counts.

On July 22, 1988, Dawson was sentenced to death by lethal injection, as a result of each of the murder convictions, in accordance with the jury's recommendations. The Superior Court also sentenced Dawson to be incarcerated for a total of 100 years with regard to the other convictions. On July 15, 1988, Dawson filed a motion for a new trial or, in the alternative, for a new penalty hearing. He also filed a motion to delay his sentencing. Both of those motions were denied.

Dawson's counsel filed a timely notice of appeal. An automatic appeal was also docketed. 11 *Del. C.* § 4209(g). Those appeals have been consolidated. Dawson's execution has been stayed.

In this direct appeal, Dawson argues that his convictions should be reversed because: (1) he was denied a fair trial and penalty hearing, when the Superior Court declined to rule on a motion *in limine* prior to jury selection; (2) the Superior Court denied his motion for a change of venue, which alleged that there had been prejudicial pretrial publicity or, alternatively, that the increased likelihood a Kent County jury will recommend a death sentence introduces an element of bias and arbitrariness into the penalty determination process; (3) the Superior Court failed to properly excuse several jurors for cause and denied Dawson's motion for additional peremptory challenges; (4) the State presented evidence relating to the theft of two vehicles, when the State did not have clear and convincing evidence to connect Dawson with either of those crimes; and (5) the State presented irrelevant and prejudicial evidence of his commission of a burglary at the residence of Frank and

Dorothy Seeney on the morning that the victim, Madeline Kisner, was killed.

Dawson also argues that he is entitled to a new penalty hearing because (1) the State's unbridled discretion in determining which defendants, convicted of Murder in the First Degree, will be subjected to a death penalty hearing is contrary to Delaware law and in violation of the Federal Constitution; (2) the Superior Court erroneously permitted the State to present evidence of his membership in the Aryan Brotherhood during the penalty hearing; (3) the Superior Court erroneously permitted the State to present evidence that his nickname was "Abaddon" along with the definition of that name, during the penalty hearing; and (4) the Superior Court erroneously instructed the jury, concerning its discretion in recommending the imposition of the death penalty.

We have reviewed each of Dawson's contentions. We find no reversible error. Therefore, the judgments of the Superior Court, which resulted in Dawson's convictions and sentences, including the imposition of the death sentences, are affirmed.

FACTS

On the morning of December 1, 1986, between midnight and 2:30 a.m., Dawson escaped from the Delaware Correctional Center ("DCC") near Smyrna along with three other inmates: Mark McCoy ("McCoy"), Richard Irwin ("Irwin") and Larry Nave ("Nave"). According to the State, McCoy, Irwin and Nave stole one car and proceeded north, while Dawson stole another car and

travelled south, where the events for which he was convicted occurred. In support of its theory, the State presented evidence of several car thefts, items obtained from the stolen vehicles, eyewitness testimony, items found in Dawson's possession when he was apprehended, and expert testimony concerning the scientific analysis of certain evidence.

The Northbound Activity

During the early morning hours of December 1, 1986, a 1965 Mustang automobile was stolen from the northern part of the Town of Smyrna. At approximately 6:15 a.m., the police discovered this vehicle parked on the northbound shoulder of Route 13, about one-half mile south of Fieldsboro. Fieldsboro is located approximately eight and one-half miles north of Smyrna. The police recovered a latent fingerprint from the vehicle, which was subsequently identified as McCoy's, and an address book belonging to Nave.

Wilbert Dill ("Dill") testified that he operated the Fieldsboro Service Station, located at the intersection of Route 13 and Noxontown Road. When Dill arrived for work at approximately 5:45 a.m. on December 1, 1986, he saw three men standing by the station's bathrooms. Dill testified that, from the station's office, he watched the three men attempt to enter vehicles which were parked at the businesses located on the other three corner of the intersection. According to Dill, all three men seemed to be wearing similar blue clothing.

Cathy Spence ("Spence"), Nave's sister, identified the three men seen by Dill as Irwin, McCoy and Nave. Spence

testified that her brother had telephoned her during the early morning hours of December 1, 1986. In response to those telephone calls, Spence stated that she went to the Fieldsboro Service Station. There, she provided Irwin, McCoy and Nave with clothing to replace their blue prison uniforms and transported them away. According to Spence, she remained with Nave, Irwin and McCoy until 6:30 or 7:00 p.m. that evening, riding around the back roads of New Castle area. Spence testified that she never saw Dawson that day.

The Southbound Activity

Sometime between 10:00 p.m., November 30, 1986, and 7:15 a.m. on December 1, 1986, a 1979 Oldsmobile Starfire was stolen from a location on the southern side of the Town of Smyrna. That vehicle was recovered by the Delaware State Police on County Route 139 outside of Kenton. Kenton is located southwest of Smyrna. The vehicle was first observed in this location between 6:00 and 6:30 a.m. on December 1, 1986.

Early that same morning, the home of Frank and Dorothy Seeney (the "Seeneys") was burglarized. The Seeneys' house is located on County Route 168, approximately 2 miles southwest of Kenton, not far from where the 1979 Oldsmobile Starfire car was found. Mr. Seeney testified that on the morning of December 1, 1986, he left home about 5:30 a.m. Mrs. Seeney left their home about 6:30 a.m. Upon returning from work, sometime after 3:30 p.m., Mrs. Seeney discovered the burglary. An inspection of the Seeney's home revealed that a men's size forty-

eight motorcycle jacket, several pocket watches, and containers of loose change had been stolen. Prior to trial, Dawson pled guilty to the two counts in the indictment which charged him with the burglary of the Seeneys' home.

The Murder Scene

The residence of Richard and Madeline Kisner is located approximately one-half mile from the Seeneys' home. Richard Kisner testified that on December 1, 1986, he left for work shortly after 7:30 a.m. His son, Brian, who was sixteen at the time, had left for school a few minutes before him. Richard Kisner testified that when he left for work, Mrs. Kisner was still at home. Her car, a 1986 Chrysler LeBaron, and a Ford pickup truck remained in the driveway.

Madeline Kisner, who usually arrived at her job by 8:30 a.m., never reported to work on December 1, 1986. Mrs. Kisner's friend and co-worker, Alice Holman ("Holman"), testified that she tried unsuccessfully to telephone Mrs. Kisner at home around 8:45 a.m., shortly after 9:00 a.m. and again about 1:15 p.m. When Holman telephoned Kisner's home again at approximately 3:40 p.m., Brian answered. According to Holman, Brian told her that his mother was apparently sleeping and he though that she must be sick.

Brian testified that, on December 1, 1986, he arrived home from school between 3:30 and 3:40 p.m. and immediately went to his bedroom to change his clothes. Brian testified that, as he walked past his parents' room, he noticed his mother lying on her bed. She was wearing a

red house coat, which she usually wore. It appeared to him that she was asleep. Brian said he assumed that his mother was sick and made no attempt to talk to her at that time.

Brian testified that after he received Holman's phone call, he went from the kitchen to the doorway of his parent's room. Brian then called to his mother but received no response. At this point, he noticed blood around his mother's head. Brian testified that he then went to his room, armed himself with a knife and, called the police. Thereafter, Brian went outside, locked himself in the family's Ford pick-up truck, and waited for the police.

When the police arrived, they found Madeline Kisner's body lying on her bed. She was dressed in a red housecoat. A nylon stocking was around her neck. Mrs. Kisner's hands had been bound behind her back with shoe laces. She had been gagged with a sock which had been placed over her mouth and knotted behind her head. She had lacerations on her forehead and multiple stab wounds to the chest area.[2]

At about 5:30 p.m., when Richard Kisner arrived home, the police were still conducting their investigation.

---

[2] Dr. Judith Tobin of the State Medical Examiner's office performed an autopsy. Dr. Tobin testified that Mrs. Kisner had sustained twelve stab wounds to the chest, a wound to the head and various attempted strangulation wounds to the neck. Dr. Tobin determined that cardiac tamponade (a hemorrhage within the pericardial sac which prevents the heart from pumping blood) resulting from one or more of the stab wounds had caused Mrs. Kisner's death.

Mr. Kisner testified that he was asked to ascertain what, if anything, had been taken from his house. He determined that the keys to the Chrysler LeBaron were missing and that the car was not in the driveway. He also discovered that some money, which had been on the top of the bedroom chest of drawers, was missing. Mr. Kisner could not remember whether his wife's purse was missing, but he did testify that she always kept several two dollar bills in her wallet.

Dawson's Apprehension

Patty Dennis ("Dennis") testified that she encountered Dawson in the Zoo Bar in Milford, Delaware, on the evening of December 1, 1986. Dennis went to the bar around 6:00 p.m. on that date. Her roommate, Geraldine Ryan ("Ryan"), entered the Zoo Bar at approximately 7:00 p.m., and began talking to a man Dennis did not know. After a period of time, Dennis, Ryan, the man with who she was speaking and several others went to another bar called the Hide-A-Way. Ryan's companion was wearing a black leather jacket which was too big for him. The group subsequently left the Hide-A-Way and went back to the Zoo Bar. Ryan's companion was asked to leave the Zoo Bar upon his return. Dennis identified Dawson as Ryan's companion.

On December 1, 1986, at approximately 9:25 p.m., Sergeant Keith Hudson ("Sergeant Hudson") of the Milford Police Department noticed a person matching Dawson's description leaving the Zoo Bar. Sergeant Hudson testified that the person he saw was approximately five feet ten inches tall, weighed about one hundred seventy-

five pounds, had long hair, a beard, and was wearing a black leather motorcycle type jacket and hat. Sergeant Hudson testified that the person he observed exiting from the Zoo Bar, turned left at a street corner and disappeared. Sergeant Hudson and another officer pursued this individual, without success.

However, Sergeant Hudson did locate Mrs. Kisner's 1986 Chrysler LeBaron in a parking lot near the Zoo Bar. The police recovered a Herr's corn chip bag and the cellophane wrapper for a cigarette carton from inside the Kisner car. It was subsequently determined that Dawson's fingerprints were on both of these items. A postcard was also found in the Kisner car. It was signed with Dawson's nickname, "Abaddon."[3]

Approximately one hour later, at 10:30 p.m., on December 1, 1986, Trooper Douglas Hudson ("Trooper Hudson") of the Delaware State Police, responded to a call to investigate a one-car accident on Sussex County Route 207. The accident involved a blue Ford LTD which had been driven across the road into a ditch. The vehicle sustained extensive damage to the left front quarter panel, the front window, and the grill. At approximately 3:55 a.m., the following morning, it was discovered that the Ford LTD had been stolen from a location in the

---

[3] The postcard was not introduced during the guilt/innocence phase of the trial or at the penalty hearing. However, during the guilt/innocence phase, the trial judge permitted the State to introduce the fact that a postcard was found in the Kisner car and that this postcard was signed with Dawson's nickname. At the penalty hearing, the Court permitted testimony that the name on the card was "Abaddon."

vicinity of the Zoo Bar. A hat, similar to the one which Sergeant Hudson had seen on the person he had chased the previous evening, was found in the vehicle. This caused Trooper Hudson to begin a house-to-house search in the area for Dawson.

At 5:25 a.m., the police found Dawson hiding on the floor of a Cadillac, which was parked approximately three-tenths of a mile from the Route 207 accident scene. He had a cut on his ear and blood on his hands. He was wearing the black motorcycle jacket which had been stolen from the Seeneys. In the jacket pockets, the police found four of the pocket watches[4] that had been stolen from the Seeneys. Among the currency seized from Dawson was at least one two dollar bill. A cotton sock, which visually appeared to match the sock used to gag Madeline Kisner, was also taken from Dawson's pocket.

Scientific Evidence

Retired FBI Special Agent Andrew Podolak ("Podolak") testified at trial about various fiber comparisons that he conducted on the items of evidence which had been submitted to the FBI laboratory. Podolak compared the white cotton sock found in Dawson's pocket with the sock used to gag Mrs. Kisner. He determined that the socks matched in all microscopic and optical properties as well as in color, composition and construction. In addition, Podolak found red triacetate fibers on both the black motorcycle jacket and the black tee shirt

---

[4] Ryan provided the police with another of the stolen pocket watches. She said Dawson had given it to her.

worn by Dawson, which matched in every observable microscopic and optical property, the red triacetate fibers found in Mrs. Kisner's robe.

Also testifying for the State were FBI serologists Joseph Errera and Randall Murch. They determined that blood found on Dawson's clothing contained genetic markers which were inconsistent with his own blood type but were consistent with Mrs. Kisner's blood type.

The defense presented three witnesses during the guilty/innocence phase of the trial. Dawson did not testify. On June 24, 1988, Dawson was found guilty as charged as to all counts.

Penalty Hearing

At the penalty hearing, the State presented the testimony of Cathy Guessford, a records custodian from the Delaware Correctional Center. Ms. Guessford related the details of Dawson's criminal history to the jury. This included Dawson's commitment to a juvenile correctional facility at age thirteen, five commitments or recommitments to the Division of Juvenile Corrections dating from October 1968, the determination that he was not amenable to the Family Court processes, fourteen prior felony convictions, three escapes from maximum security juvenile institutions and three adult escapes, and twenty-four conduct violations resulting in sanctions against him as an inmate.

At the penalty hearing Dennis elaborated upon her encounter with Dawson on the evening of December 1st. She testified that Dawson identified himself to her as

Abaddon and told her that the name meant "one of Satan's disciples." Detective Joseph Huttie ("Huttie") testified that Webster's dictionary defines Abaddon as "angel of the bottomless pit." Huttie testified that when Dawson was arrested, a photograph was taken showing the name Abaddon tattooed across Dawson's stomach. Huttie also testified that Dawson's right hand bore a tattoo with the words "Aryan Brotherhood" above and below a diamond shaped symbol. The State introduced a stipulation describing the nature of the Aryan Brotherhood.

The defense presented two family members as witnesses at the penalty hearing. The jury returned a verdict unanimously recommending the imposition of the death penalty on each of the four counts of Murder in the First Degree.

MOTION IN LIMINE

Prior to trial, Dawson's counsel learned that Dawson was a member of a prison group known as the Aryan Brotherhood. The record reflects that the Aryan Brotherhood is a white supermacist Nazi oriented gang. It originated at the San Quentin Prison in California in response to perceived threats from racial minority gangs of inmates.[5] Dawson has tattoos on his body displaying the

---

[5]THE COURT: Counsel, as a follow-up on your representation regarding the nature of your understanding of what the Aryan Brotherhood is, I conducted a nexus search using the term brotherhood and was able to determine from wire services and other news

(Continued on following page)

name of this organization, above and below what is allegedly one of its symbols. Dawson's counsel also became aware that Dawson has several swastikas tattooed on his body and, that while incarcerated, Dawson had painted a large swastika on one wall of his prison cell.

In view of the information concerning the Aryan Brotherhood and the swastikas, Dawson's counsel filed a pre-trial motion *in limine*. Dawson's counsel sought a ruling excluding all testimony relating to Dawson's membership in the Aryan Brotherhood. The motion also sought to prohibit the State from requesting that Dawson exhibit any of his tattoos to the jury. In response to Dawson's motion *in limine*, the State indicated that it was not inclined to introduce evidence relating to the Aryan Brotherhood during the guilt/innocence phase of Dawson's trial, but that it would seek to do so during the penalty hearing, if Dawson was convicted.

Dawson's counsel submitted to the Superior Court that, despite the State's response, a ruling on the admissibility of evidence concerning the Aryan Brotherhood

---

(Continued from previous page)

media accounts which describe the organization that the Aryan Brotherhood is a white supermacist Nazi oriented gang which first originated in San Quentin Prison in California. Its apparent motto: Kill to get in and die to get out.

In various prisons throughout the United States this gang has a reputed violence against black and Latino prison gangs. I found no indication as to the acts of violence against particular religious groups on the part of the Aryan Brotherhood.

was needed before jury selection began. Dawson's counsel argued that if a ruling was not made before trial, he would be forced to use his peremptory challenges to strike potential jurors who would otherwise be acceptable to Dawson.[6] The Superior Court declined to decide the merits of Dawson's motion *in limine* prior to trial. On April 8, 1988, the Superior Court ordered:

> the objections [raised by the defendant's *in limine* motion] shall be considered in the context of trial itself. The State shall not elicit the evidence objected to without prior notice to defense counsel and the [Superior] Court.

During a subsequent pretrial conference, Dawson's counsel asked the Superior Court to reconsider its April 8, 1988 ruling. However, the trial judge adhered to his prior decision stating:

> What I am saying is what I have already said. The State is prohibited from introducing any evidence or evidence relating to the Aryan Brotherhood without leave of the Court. I will

---

[6] Specifically, Dawson's counsel indicated that he would like to have Blacks and Jews sitting on the jury, alleging sociologists have determined that these people are the most compassionate and understanding and, therefore, would be more inclined to acquit Dawson. Additionally, Dawson's counsel argued that if the sociologists are correct, these persons would be more likely to be against an imposition of the death penalty, if Dawson was found guilty. Thus, Dawson's counsel argued that he faced a dilemma in that, if the Superior Court failed to rule on the evidentiary issues in the motion *in limine* before trial, he would be forced to use peremptory challenges to strike Blacks and Jews.

> judge its probative value and any defense balancing as necessary under Rule 403 in the context of what proceedings are at the time in which the evidence is offered.

In response to that reiterated ruling, Dawson's counsel requested that the Superior Court propound a *voir dire* question designed to identify potential jurors who might be improperly influenced by the introduction of the evidence about the Aryan Brotherhood. The State did not object to that motion by Dawson's counsel.[7] The Superior Court granted Dawson's request. *Voir dire* question #20, which was asked of prospective jurors, stated:

> "In this case there may be evidence relating to membership in an organization called the Aryan Brotherhood, a white supremacist group. Would

---

[7] PROSECUTOR: Your Honor, if we could amplify our position a little bit. [Defense Counsel] has reiterated his concerns about the possible racial or religious undertones that may be kicked up, if you will, by references to Nazism or Aryan Brotherhood or any such references. We have maintained and continue to maintain our position that these are all reflective of the defendant's character should we get to the penalty phase and the evidence is relevant at that point.

I just want to state for the record that with our sensitivity to [Defense Counsel's] perceived dilemma or problem that the jury may decide this penalty phase on something other than the evidence produced at the phase, at the penalty phase we are specifically sanctioning any questions that [Defense Counsel] wants to ask that probe that issue, that whatever *voir dire* he wants to get into that deals with that question we are amenable to.

> this affect your ability to serve as a fair and impartial juror in this case?"

Dawson argues that the Superior Court committed reversible error in declining to rule on the merits of his motion *in limine* prior to trial. "*In limine*" is defined as "[o]n or at the threshold; at the very beginning; [or] preliminarily." Black's Law Dictionary 787 (6th ed. 1990). The term is used "in a broad sense to refer to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984).

The State argues that a ruling on the merits of Dawson's motion *in limine* would not necessarily have constituted a final determination on the admissibility of evidence about the Aryan Brotherhood. *Luce v. United States*, 469 U.S. at 41. The State correctly points out that an *in limine* ruling is subject to change when the case unfolds. *Id.* "[E]ven if nothing unexpected happens at trial, the . . . judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling." *Id. See also United States v. Masters*, 840 F.2d 587, 590-91 (8th Cir. 1988); *State v. Floyd*, S.C. Supr., 369 S.E.2d 842 (1988); *Gilliam v. State*, Ind. Supr., 383 N.E.2d 297 (1988); *State v. Fernandes*, R.I. Supr., 526 A.2d 495 (1987). *Compare United States v. Burkhead*, 646 F.2d 1283 (8th Cir. 1981); *State v. Lariviere*, R.I. Supr., 527 A.2d 648, 649 (1987).

"Ordinarily, the determination of what evidence will be admitted is left to the discretion of the trial court." *United States v. Burkhead*, 646 F.2d at 1285; *Strauss v. Biggs*, Del. Supr., 525 A.2d 992, 997 (1987). Although this discretion is not unbridled, it has generally included the option

"to defer ruling on evidentiary issues until the evidence is actually offered for admission." *Id.* at 1286.

> The general rule permitting [a trial court] to delay evidentiary rulings is designed to prevent unnecessary and unwarranted advisory opinions. It is sometimes unwise to decide whether to admit evidence before it is actually presented. If no advance ruling is made, the parties may decide to abandon their positions for reasons unrelated to the anticipated ruling of the court. A refusal to rule may thus promote judicial economy. In other situations, a delayed ruling is advisable because the facts as they develop during the course of the proceeding may affect the determination of admissibility.

United States v. Burkhead, 646 F.2d at 1286.

The Superior Court decided that the issues presented by Dawson's motion *in limine* should be ruled upon within the context of the trial. However, the Superior Court prevented the disclosure of potentially prejudicial information to the jury by prohibiting the State from introducing any evidence relating to the Aryan Brotherhood without its prior permission. The Superior Court also permitted Dawson's counsel to propose specific *voir dire* questions to be asked of the venire panel, as an additional safeguard, to protect against an adverse ruling on the objection to evidence about the Aryan Brotherhood.

By acting in accordance with the general rule, the Superior Court's decision, with respect to Dawson's motion *in limine*, was an exercise of discretion. Under the circumstances of this case, we find that the Superior Court properly exercised its discretion. Although it

declined to rule on the admissibility of evidence about the Aryan Brotherhood until the State requested permission to introduce it at trial, the Superior Court granted Dawson's request for additional pre-trial *voir dire* about the Aryan Brotherhood, and it ordered the State not to refer to evidence about the Aryan Brotherhood without prior approval.

The Superior Court's action assured that the jury would not be improperly influenced during the trial if Dawson's objections to the evidence were sustained. By affording Dawson the pre-trial opportunity to expand the *voir dire* of the venire panel and by tailoring the *voir dire* questions to the circumstances of the case, the Superior Court protected Dawson against the seating of a juror, who might be biased by evidence about the Aryan Brotherhood, in the event Dawson's objections were overruled. *Riley v. State*, Del. Supr., 496 A.2d 997, 1007 (1985). The Superior Court's disposition of Dawson's motion *in limine* was responsive and effective.[8]

CHANGE OF VENUE

Prejudicial Pretrial Publicity

On May 22, 1987, Dawson's counsel filed a pre-trial motion for a change of venue. Super. Ct. Crim. R. 21(a). Dawson contended, in part, that extensive prejudicial pre-trial publicity precluded him from receiving a fair

[8] The Superior Court ultimately concluded that the State could introduce evidence about the Aryan Brotherhood during the penalty phase of Dawson's trial. That decision was proper, for the reasons set forth in this opinion.

and impartial trial in Kent County, where the crimes had occurred. That motion was denied. Throughout the subsequent pre-trial proceedings, including the jury selection process, Dawson's counsel renewed his motion for a change of venue. On each occasion, that motion was denied by the Superior Court.

A change of venue will be granted only upon a showing of reasonable probability of prejudice.[9] *McBride v. State*, Del. Supr., 477 A.2d 174, 185 (1984) (citing *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966)). To make such a showing, a defendant must present evidence of highly inflammatory or sensationalized pre-trial publicity sufficient for the court to presume prejudice. *Riley v. State*, 496 A.2d at 1014. In the absence of showing inherently prejudicial pre-trial publicity, the defendant must demonstrate actual prejudice through *voir dire*. *Id.* at 1015. *Accord McBride v. State*, 477 A.2d at 185-86. "Whichever path is

[9] Rule 21(a) states, in pertinent part, that a change of venue of criminal prosecution to either of Delaware's two other counties is warranted if "there exists in the county where the prosecution is pending so great a prejudice against [defendant] that he cannot obtain a fair and impartial trial in that county." In *McBride*, this Court stated that Rule 21 "should be amended to eliminate the requisite showing by a defendant that there exists 'so great a prejudice against defendant that he cannot obtain a fair and impartial trial in that county.' " 477 A.2d at 185 (quoting *Parson v. State*, 275 A.2d 777, 785 (1971)). We directed that henceforth, "a change of venue [be granted] upon a showing that there exists a 'reasonable probability' or 'reasonable likelihood' of prejudice against a petitioner." 477 A.2d at 185; *Riley v. State*, Del. Supr., 496 A.2d 997, 1014 n.21 (1985).

chosen, the decision to grant or deny a request for change of venue is a matter for the reasonable exercise of the trial court's discretion." *Riley v. State*, 496 A.2d at 1015 (citing *Parson v. Delaware*, Del. Supr., 222 A.2d 326 (1966), *cert. denied*, 386 U.S. 935 (1967). Dawson asserted both bases for relief in his motion requesting a change of venue.

Initially, Dawson's counsel argued that the highly inflammatory and sensational nature of the pretrial [sic] publicity was sufficient to create a presumption that Dawson could not obtain a fair trial in Kent County. The record reflecting that news of Dawson's escape and the murder of Madeline Kisner was broadcast on various television and radio stations serving Kent County. In addition, many articles concerning the prison escape and the murder appeared in both *The News Journal* and *The Delaware State News*, the two major papers of general circulation in Kent County.

The Superior Court reviewed the news media accounts submitted by Dawson's counsel, including an article printed in *The News Journal* on June 5, 1988, the day before jury selection was scheduled to begin. The Superior Court concluded that the news accounts were largely informational in scope and insufficient to give rise to a presumption of prejudice in the venire panel which had been summoned for jury duty. The record supports that decision. A rational factfinder could reasonably conclude that Dawson had not presented "evidence of highly inflammatory or sensationalized pre-trial publicity sufficient for the [Superior] [c]ourt to presume prejudice. . . ." *Riley v. State*, 496 A.2d at 1014-15. *Compare Rideau v. State of Louisiana*, 373 U.S. 723 (1963); *McBride v. State*, Del. Supr., 477 A.2d 174 (1984). It is well established that

routine pre-trial publicity of a criminal case will not justify granting a motion for change of venue. *Riley v. State*, 496 A.2d at 1014.

Alternatively, Dawson's counsel argued that, even if prejudice could not be presumed from the news media accounts, actual prejudice was demonstrated during the *voir dire* of the venire panel. The record reflects that it took almost four full days to impanel the jury. During this time, there was individual *voir dire* of one hundred thirty persons, from two jury panels, before the jury of twelve and the four alternates were chosen. At the beginning of the Superior Court's session each day and at the end of the jury selection process, Dawson's counsel presented the trial judge with his own statistical evaluation, which demonstrated that a high percentage of the potential jurors indicated they "had some knowledge or read something in the newspaper about the case."[10] The

---

[10] The statistics presented by Dawson's counsel indicated:

	Panel I			Panel II		
	Day 1	Day 2	Day 3	Day 3	Day 4	TOTAL
Peremptory: Dawson	8	10	2	3	4	27
Peremptory: State	2	4	6	1	2	15
Excused by Court	3	7	2	3	9	24
Challenges for Cause	7	21	9	4	7	48
Jurors Chosen	3	3	4	0	6	16
Total Jurors	23	45	23	11	28	130

(Continued on following page)

Superior Court was not persuaded to grant the motion for a change of venue on the basis of that statistical analysis.[11]

The accused's right to a trial by a jury of his peers is fundamental to our criminal justice system. *Irvin v. Dowd*, 366 U.S. 717, 721 (1961). An essential ingredient of that

---

(Continued from previous page)

Number who had knowledge of case:	12	29	16	4	16	77
Percentage who had knowledge of case:	52.17%	64.44%	69.56%	36.36%	57.14%	59.23%
Adjusted Percentage of those who had knowledge of case:	63.15%	80.55%	76.19%	57.14%	80.00%	74.75%

Dawson's counsel arrived at the "adjusted percentage of those who had knowledge of the case" by excluding those jurors who were excused prior to being asked that question.

[11] The statistical analysis presented by Dawson's counsel is similar to that relied upon in *Irvin v. Dowd*, 366 U.S. 717 (1961). However, the facts in *Irvin* are readily distinguishable from the facts in Dawson's case. In *Irvin*, eight of the twelve jurors, or 66% of those finally seated, indicated prior to trial that in addition to being familiar with the facts and circumstances surrounding the case, they thought that the defendant was guilty. *Id.* at 727. The *voir dire* record in *Irvin* showed that 90% of the jury panel members (excluding 10 who were never asked) had some opinion as to guilt ranging in intensity from mere suspicion to absolute certainty. *Id.*

right is that the jury consist of impartial jurors. *See Turner v. Louisiana*, 379 U.S. 466 (1965); *In re Oliver*, 333 U.S. 257 (1948). However, the right to a fair trial by a panel of impartial, "indifferent jurors," does not require that "the jurors be totally ignorant of the facts and issues involved." *Irvin v. Dowd*, 366 U.S. at 721-22.

"Impartiality is not a technical conception. It is a state of mind." *United States v. Wood*, 299 U.S. 123, 145 (1936). Prior knowledge of the facts and issues of the case, or even a preconceived notion of guilt or innocence, will not automatically disqualify a prospective juror "if the juror can lay aside his impression or opinion and render a verdict based upon the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961); *Dutton v. State*, Del. Supr., 452 A.2d 127, 137 (1982).

The Constitution lays down no particular test and there is no ancient and artificial formula for ascertaining a juror's mental attitude of "appropriate indifference." *Irvin v. Dowd*, 366 U.S. 717 724-25 (1961). However, the method that has been consistently relied upon historically to ascertain a juror's mental attitude is *voir dire*. *Patton v. Yount*, 467 U.S. 1025, 1038 (1984) (citing *United States v. Burr*, 25 F.Cas. No. 14,692g, p. 49, 51 (No. 14,692g) (CC Va. 1807) (Marshall, C.J.)). The purpose of *voir dire* examination is to provide the court with sufficient information to decide whether prospective jurors can render an impartial verdict, based upon the evidence developed at trial, and in accordance with the applicable law. *Dutton v. State*, 452 A.2d at 136; *Parson v. State*, Del. Supr., 275 A.2d 777, 780 (1971).

The fact that a high percentage of prospective jurors had some knowledge of information about Dawson's case did not establish *per se* that an impartial jury could not be impanelled in Kent County. *See Smith v. Phillips*, 455 U.S. 209 (1982). However, the situation did require the trial judge, through a careful use of *voir dire*, to determine

> "What information each juror ha[d] heard or read, the source of the information and how it ha[d] affected his or her attitude toward the defendant and the case at hand. It is only after acquiring such knowledge that the judge is in a position to accurately evaluate a juror's responses and his eligibility to serve."

Hughes v. State, Del. Supr., 490 A.2d 1034, 1042-43 (1985).

Defendants in capital cases have a right to have jurors questioned individually in order to intelligently determine who should be challenged for cause and who should be challenged peremptorily. *Steigler v. State*, Del. Supr., 277 A.2d 662 (1972), *vacated in part*, 408 U.S. 939 (1972).[12] The applicable Delaware statute provides:

> When a juror is called in a capital case, he shall be first sworn or affirmed upon the voir dire and then asked, under the direction of the court, if he has formed or expressed any opinion in regard to the guilt or innocence of the prisoner at the bar . . . If his answer to the question be in the affirmative, he shall be disqualified to sit in the case, unless he shall say, upon his oath or affirmation, to the satisfaction of the court, that he feels able, notwithstanding such an opinion, to render an impartial verdict upon the law and the evidence, in which event he shall be a competent juror, if not otherwise disqualified, challenged, or excused.

11 *Del. C.* § 3301. In Dawson's case, the *voir dire* examination of the venire panel was conducted individually. After following the requirements of the Delaware statute and the holdings of *Dowd*, the Superior Court concluded that each juror who was seated in Dawson's case could "lay aside his or her impression[s] or opinion[s] and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. at 723 (citations omitted).

The trial court's finding of impartiality is entitled, even on direct appeal, to "special deference." *Irvin v. Dowd*, 366 U.S. at 724; *Patton v. Yount*, 467 U.S. 1025 (1984). However, the trial court's finding of juror impartiality, notwithstanding prior knowledge or impressions, "cannot foreclose inquiry as to whether, in a given case, the application of [the] rule [of *Dowd*] works a deprivation of [the defendant's] life or liberty without due process of law." *Irvin v. Dowd*, 366 U.S. at 723. When appropriate, as in highly publicized cases, this Court has a duty to independently evaluate the *voir dire* testimony of the impanelled jurors. *Id.; Hughes v. State*, 490 A.2d at 1041.

The standard for appellate review of this issue is set forth in *Irvin v. Dowd*. The trial court's finding of impartiality "ought not be set aside by the reviewing Court unless the error is manifest." *Irvin v. Dowd*, 366 U.S. at

---

[12] This Court, the Third Circuit Court of Appeals, and the ABA Standards Relating to Fair Trial and Free Press all recommend individual *voir dire* in non-capital cases involving "possible juror exposure to prejudicial information." See *U.S. v. Addonizio*, 451 F.2d 49, 67 (3d Cir. 1972), *cert. denied*, 405 U.S. 936 (1972); *Hughes v. State*, 490 A.2d 1034, 1043 n.7 (1985); The ABA Standards Relating To Fair Trial and Free Press § 3.5.

723. The trial judge is in a unique position to evaluate jurors' assurances of impartiality because demeanor plays a crucial role in the determination of impartiality. *Hughes v. State*, 490 A.2d at 1041; *Patton v. Yount*, 467 U.S. 1025 (1984); *Dutton v. State*, Del. Supr., 452 A.2d 127, 137 (1982). A juror may not be able to speak for his own bias simply because he is unaware of its existence. *Smith v. Phillips*, 455 U.S. 209, 221-22 (1982). *See also Patton v. Yount*, 1025 U.S. at 1031; *Young v. State*, Del. Supr., 407 A.2d 517, 520 (1979).

In Dawson's case, the trial judge conducted a *voir dire* "examination designed to elicit answers which [would] provide an objective basis for his evaluation" of each juror. *Gray v. State*, Del. Supr., 441 A.2d 209, 219 (1982) (citing *Young v. State*, Del. Supr., 407 A.2d 517, 521 (1979), *cert. denied*, 446 U.S. 940 (1980)). The trial judge did not merely "go through the motions." *Id.* The record reflects that the trial judge's determination of impartiality was made in Dawson's case only after an extended individual *voir dire* proceeding designed specifically to identify biased veniremen. *Patton v. Yount*, 467 U.S. at 1038. *Compare Hughes v. State*, Del. Supr., 490 A.2d 1034 (1985); *Parson v. State*, Del. Supr., 275 A.2d 777 (1971). "It is fair to assume that the method we have relied on since the beginning, e.g., *United States v. Burr*,. . . . usually identifies bias." *Patton v. Yount*, 467 U.S. at 1040.

The party seeking a change of venue has the "burden of tendering cogent proof that a fair trial could not be had in the county in which the indictment was returned." *McBride v. State*, Del. Supr., 477 A.2d 174, 184 (1984). Neither the *voir dire* testimony or the record of pre-trial publicity in Dawson's case reveal the "wave of public

passion" that would have made a fair trial unlikely in Kent County. *Patton v. Yount*, 467 U.S. at 1040; *Murphy v. Florida*, 421 U.S. 794, 800 (1975); *Irvin v. Dowd*, 366 U.S. at 728; *Hughes v. State*, 490 A.2d at 1046. After an independent evaluation, we conclude that Dawson has not demonstrated a "reasonable probability" or "reasonable likelihood" of prejudice against him, *by the jury that was impaneled as a whole*, in Kent County. *McBride v. State*, 477 A.2d at 185. We find no manifest error in the Superior Court's decision to deny Dawson's motion for a change of venue, based upon prejudicial pre-trial publicity. *Irvin v. Dowd*, 366 U.S. at 723-24.

Capital Punishment in Kent County

Dawson's counsel also contends that the motion for a change in venue should have been granted by the Superior Court because, he was able to show, by a statistical analysis, that "it is far more likely that any defendant found guilty of murder in the first degree will receive the death sentence in Kent County than in New Castle County or Sussex County." Dawson's counsel argues that his statistical evidence demonstrates an element of arbitrariness in the penalty determination process in Delaware, which is unconstitutional under the Eighth Amendment of the United States Constitution. *See Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972). The statistical evidence upon which Dawson relies is that:

> since May 14, 1977, the effective date of [Delaware's] death penalty statute, and until 1986, there had been a total of one hundred eight (108) First Degree Murder indictments in New

> Castle County, forty (40) in Kent County, and forty (40) in Sussex County. Of the seven defendants currently under a sentence of death, six have been sentenced by Kent County juries. Kent County, with only twenty-one percent of the murder indictments for the State, is thus responsible for eighty-three percent of the death sentences.

Dawson argues that the foregoing statistics demonstrate that Kent County juries appear "uncommonly willing to condemn a man to die." *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968).

The State submits that the statistical evidence upon which Dawson bases his claim is inadequate. The State argues that Dawson's analysis fails to address several important variables, *inter alia:* the number of cases in which the death penalty was sought in each county; the number of cases in which a penalty hearing was actually conducted in each county; variations in the nature and circumstances of the various cases in which a penalty hearing was held in each county; and variables in the character and propensities of defendants in each case in which a penalty hearing was held in each county. Additionally, the State points out that, apart from his own case and one other,[13] Dawson does not contend that any of the death sentences imposed in Kent County were unwarranted.

---

[13] *State v. Sanders*, Del. Super., No. IK86-03-0898-0903, is a case presently pending before this Court, in which a Kent County jury found a defendant guilty but mentally ill and recommended the imposition of the death sentence.

In ruling upon this aspect of Dawson's motion for a change of venue, the Superior Court stated:

> [The] defendant has failed to carry his ultimate burden of persuasion on this issue. His statistical method has not accounted for all the neutral variables unrelated to venue in each of the capital crimes which could have produced the same result. Nor has his method accounted for all of the neutral variables unrelated to venue in the character and propensities of each capital defendant which could have produced the same result.

In addition, the Superior Court stated:

> Moreover, [the] defendant's argument that Kent County juries are "uncommonly willing to condemn a man to die" fails even using his deficient statistical method. Of the last three Kent County first-degree murder cases involving a capital penalty phase, each has resulted in a life sentence. *See State v. Shipley, State v. Graham,* and *State v. Thompson.*

Dawson's statistical argument must be viewed in the context in which it is raised. *McCleskey v. Kemp*, 107 S.Ct. 1756, 1769 (1987). Dawson "challenges decisions at the heart of the criminal justice system." *Id.* "[O]ne of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder." *Id.* (citing *Gregg v. Georgia*, 428 U.S. 153, 226 (1976) WHITE, J., concurring). The implementation of these laws, by necessity, requires discretionary judgments. *Id.*

The unique nature of the decisions at issue in the criminal laws against murder require caution before an inference is adopted based upon a statistical study. *Id.*

Because discretion is essential to the criminal justice process, this Court, like the United States Supreme Court, demands exceptionally clear statistical proof before we would infer that the discretion accorded to juries in capital cases has been abused. *Id. See DeShields v. State*, Del. Supr., 534 A.2d 630, 646 (1987). We hold that Dawson's study is clearly insufficient to support an inference that an element of arbitrariness was introduced into his case by having his penalty hearing before a Kent County jury. *Id.* The Superior Court's decision denying Dawson's motion for a change of venue, on the basis of the deficiencies in his statistical presentation, is affirmed. *Id.*

JUROR CHALLENGES

In addition to challenging the Superior Court's finding of impartiality concerning the Kent County venire panel collectively, Dawson contends that several of the Superior Court's decisions regarding individual jurors were erroneous. Dawson's argument concerning the rulings is three-fold. First, he contends that he was forced to use eight peremptory challenges, when the trial judge abused his discretion in refusing to excuse certain prospective jurors for cause.[14] Second, he contends that two

[14] Dawson's counsel had prepared a chart to illustrate the peremptory challenges he exercised when his challenges for cause were denied.

(Continued on following page)

of the jurors who served, Buel Parrish ("Parrish") and Francis Angel ("Angel") should have been excused for cause. Third, he contends that the trial judge's refusal to grant him additional peremptory challenges denied him

(Continued from previous page)

Prospective Juror	Prospective Juror Number	Dawson's Peremptory	Challenge For Cause Requested By Dawson
1. Michael D. Shahan (A099-109)	10	3	Yes (A-106)
2. Jessie M. Shannon (A-109-122)	11	4	Yes (A-285-286, 291-296)
3. Charles S. Coverdale (A-235-249)	30	10	Yes (A-243-247)
4. Sylvia W. Cooper (A-291-298)	41	12	Yes (A-297)
5. Andrew J. Fox (A-316-324)	46	14	Yes (A-322)
6. Mary F. Harris (A-338-345)	52	15	Yes (A-344)
7. Orrie W. Dean (A-382-392)	61	17	Yes (A-391)
8. Donna J. Couden (A-457-465)	73	19	Yes (A-464)

the opportunity to strike Parrish, Angel and a third juror, Doris A. Duerr ("Duerr").

Dawson's first contention is that the Superior Court's failure to excuse eight jurors for cause required him to challenge each of them peremptorily, thereby violating his right to a trial by an impartial jury. U.S. Const. amend. VI and XIV. In addressing this argument, it is not necessary to determine the merits of the Superior Court's rulings which denied Dawson's challenges for cause. The United States Supreme Court has held that the "loss of a peremptory challenge," to cure a trial court's error in not dismissing a juror for cause, does not constitute a violation of the constitutional right to an impartial jury. *Ross v. Oklahoma*, 108 S.Ct. 2273, 2278 (1988). "[P]eremptory challenges are not of constitutional dimension. They are a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean that the Sixth Amendment was violated." *Id. See also, DeShields v. State*, Del. Supr., 534 A.2d 630, 636 (1987).

The focus of Dawson's second contention is, quite properly, on the jurors who were seated to hear his case. *Ross v. Oklahoma*, 108 S.Ct. 2273 (1988). At trial, and on appeal, Dawson argues that two of these jurors, Parrish and Angel should have been excused for cause. According to Dawson, the Superior Court's failure to excuse Parrish and Angel, at a time when he had no peremptory challenges remaining, resulted in their service as jurors, in violation of his right to a fair trial by an impartial jury. *Irvin v. Dowd*, 366 U.S. 717 (1961).

Dawson has three factual bases for his argument that Parris should have been excused for cause. First, Dawson contends the fact that Parrish is Black raises the "potential" of racial prejudice, due to the admission of evidence about the Aryan Brotherhood. Second, Dawson questions Parrish's impartiality because, contrary to the Superior Court's written instructions to the entire venire panel, Parrish read a portion of a newspaper article about the case. Third, Dawson argues Parrish should have been excused because his brother was the victim of an unsolved murder in Philadelphia.

The record reflects that, in fact, Parrish was the only Black person seated on the jury. During *voir dire*, Parrish stated that evidence relating to the Aryan Brotherhood, a white supremacist group, would not affect his ability to be fair and impartial.[15] During *voir dire*, Parrish also disclosed that his brother had been the victim of an unsolved murder in Philadelphia in approximately 1978.[16] Parrish stated that this would not affect his ability

---

[15] Q. In this case there may be evidence relating to membership in an organization called the Aryan Brotherhood, a white supremacist group. Would this affect your ability to serve as a fair and impartial juror in this case?

A. No, sir, it wouldn't.

[16] We note that this Court has previously found no abuse of discretion when a trial judge declined to ask prospective jurors whether they or their families had been victims of a violent crime. *McBride v. State*, Del. Supr., 477 A.2d 174, 190-91 (1984); and *Jacobs v. State*, Del. Supr., 358 A.2d 725, 728 (1976).

to decide Dawson's case impartially.[17] In addition, during *voir dire*, Parrish disclosed that he unintentionally read part of a newspaper account, in violation of the Court's order not to read anything concerning the Dawson case prior to the completion of jury selection. However, Parrish said when he realized the article pertained to the

---

[17] Q. Have you or a relative or close friend of yours ever been the victim of a crime of violence?

A. Yes, sir.

Q. Where, when and what type of crime?

A. My brother was murdered about ten years ago in Philadelphia.

Q. Were you interviewed by any member of any law enforcement agency.

A. No, sir. I was away in the military at the time.

Q. Was there a prosecution of the offense?

A. No, sir.

Q. Was any arrest made?

A. No, sir.

Q. As a result of that circumstance, do you have any bias for or against the defendant in this case?

A. No, sir, I don't.

Q. As a result of that, do you have any bias or prejudice for or against the State in this case?

A. No, sir.

Dawson case, he stopped reading it.[18] Parrish said he had formed no opinion of Dawson's guilt or innocence as a result of what he read.

---

[18] Q. Have you read or heard anything concerning this case through the news media, television radio, newspapers or any other source?

A. I did happen to see a blurt yesterday in yesterday's papers after yesterday afternoon.

Q. What did you see in yesterday's paper?

A. Something concerning the trial, about Mr. Dawson's trial. It was about a seven, eight line paragraph in the paper.

Q. Did you read the article?

A. I'm afraid I did.

Q. Did you receive the Court's instruction dated May 10th with the jury summons that instructed you not to read, view or listen to any reports in the press, radio or television about the case?

A. Yes, sir, I did.

Q. Do you have any explanation for your disregard of that?

A. Well, it was unintentional. I had to read it before I realized what had happened. It was just an oversight.

Q. Before you finished the article, did you realize it was about this case?

A. Yes, sir, I did.

Q. You continued to read it?

(Continued on following page)

Dawson contends that Angel should have been excused for cause, as a consequence of his exposure to

---

(Continued from previous page)

A. No, I stopped reading after I realized what it was.

Q. What do you recall the article saying?

A. Just saying something about jury selection for the Dawson trial. That's when I stopped reading.

Q. Did you read the entire article or not?

A. No, sir, I did not read the entire article.

Q. Have you read or hearing [sic] anything else about this case at any other time through the news media or any other source?

A. No, sir, I haven't.

Q. Did you discuss with anyone else anything that you read or heard about this case?

A. No, sir.

Q. Have you formed any opinion as to the guilt or innocence of the defendant in this case as a result of what you read or heard through the news media or discussed with anyone else?

A. No, sir, I have not.

Q. Would anything you read or heard through the news media or elsewhere make it difficult for you to render a fair and impartial decision in the case based solely on the evidence introduced at the trial and the instructions given you by the Court?

A. No, sir, it wouldn't.

pretrial publicity.[19] During *voir dire,* Angel stated that he had read about the incident "when it first happened." He remembered that it occurred in Kenton and that "some lady got killed." He also related that he had discussed what he had read with his wife. In response to the trial judge's *voir dire* inquiry, Angel stated that he had not formed an opinion regarding Dawson's guilt or innocence and would be able to render a fair and impartial verdict, solely upon the basis of the evidence presented at trial.

The trial court has broad discretion in determining whether a prospective juror should be excused for cause. *Parson v. State*, Del. Supr., 275 A.2d 777 (1971). Determinations of juror impartiality are the responsibility of the trial judge who has the opportunity to question the jurors, observe their demeanor, and evaluate the ability of the jurors to render a fair and impartial verdict. *DeShields v. State*, 534 A.2d at 636; *Williams v. State*, Del. Supr., 494 A.2d 1237, 1243 (1985). Since the trial court's finding of

---

[19] On appeal, Dawson also argues that Angel should have been excused for cause since he stated that he believed in the death penalty. However, there was no request for supplemental inquiry on this point during *voir dire* and it was not part of the basis on which Dawson challenged Angel for cause. Supr. Ct. R. 8. Nevertheless, the law is clear that a belief in the death penalty cannot *ipso facto* disqualify a juror from service in a capital murder case. *Wainwright v. Witt*, 469 U.S. 412 (1985). "The proper standard for determining when a prospective juror may be excused for cause because of his or her views on capital punishment . . . is whether the juror's views would '[sic] prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 424. *See also DeShields v. State*, 534 A.2d at 634. Angel swore that he could adhere to his oath and be fair and impartial.

impartiality will rest on the judge's personal observation of the *voir dire* proceedings and on the judge's impression regarding the credibility of the jurors, a reviewing court should give those findings great deference. *DeShields v. State*, 534 A.2d at 636.

The record reflects that the Superior Court questioned Parrish and Angel specifically, during their individual *voir dire*, about each of the areas of Dawson's concern. The Superior Court personally assessed Parrish's and Angel's unequivocal assertions of their ability to serve impartially and found each of them to be credible. *DeShields v. State*, 534 A.2d at 636; *White v. State*, Del. Supr., 404 A.2d 137, 139-40 (1979). On this record, we find no abuse of discretion in the Superior Court's decision not to strike either Parrish or Angel for cause. *DeShields v. State*, 534 A.2d at 636.

In his third argument relating to the jury selection process, Dawson contends that he was denied a fair trial by the Superior Court's rejection of his request for additional peremptory challenges. Dawson asserts that the Superior Court's refusal to grant him additional peremptory challenges denied him the opportunity to strike not only Parrish and Angel, but also Duerr. Dawson's counsel asserts that his own trial notes indicate he would have used a peremptory challenge to strike Duerr, if he had one to exercise. Since Duerr was not challenged for cause, Dawson's argument with regard to her service as a juror is based solely upon the Superior Court's peremptory challenge rulings.

In March, 1988, following a preliminary hearing, Dawson's counsel filed a motion for additional peremptory challenges. Dawson's counsel argued that because

the evidence would be highly inflammatory and because of the manner in which the case had been reported by the media, the twenty (20) peremptory challenges allowed under Superior Court Criminal Rule 24(b)2 would "in all probability be insufficient to adequately permit counsel to select an impartial jury." On April 8, 1988, the Superior Court denied that motion "without prejudice to renewal at jury selection."

On the third day of jury selection, after Dawson's counsel had exercised his twentieth and last peremptory challenge, he renewed the motion for additional peremptory challenges. Although the trial judge denied Dawson's renewed motion for additional peremptory challenges, he indicated that the issue could be raised again, should it be necessary to go beyond the initial group of ninety-two prospective jurors in order to seat the jury.[20] Dawson contends that this ruling constitutes reversible error.

Peremptory challenges are not constitutionally required. *Ross v. Oklahoma*, 108 S.Ct. at 2278-79 (internal quotation omitted); *Jackson v. State*, Del. Supr., 374 A.2d 1 (1977). Consequently, peremptory challenges exist as a matter of privilege. *Hickman v. State*, Del. Supr., 431 A.2d 1249, 1250 (1981). The purpose, the manner of use, and

---

[20] After the initial ninety-two potential jurors had been exhausted, a second group of potential jurors had to be called in order to seat a full jury, including the four alternates. Before jury selection from the second group proceeded, the Superior Court granted five additional peremptory challenges to Dawson and three to the State. Dawson does not challenge that ruling or any other portion of the jury selection process involving this second group of jurors.

the number of peremptory challenges allowed are determined by State law. *Ross v. Oklahoma*, 108 S.Ct. at 2279. Accordingly, the denial of Dawson's request for additional peremptory challenges must be reviewed in the context of Delaware's law on the subject.

Superior Court Criminal Rule 24(b) provides that *multiple* defendants in capital cases shall be entitled to a total of twenty peremptory challenges, *not twenty each*. *Hickman v. State*, 431 A.2d at 1250. Superior Court Criminal Rule 24(b) reads, in pertinent part, as follows:

> In capital cases the State shall be entitled to 12 peremptory challenges and the *defendant or defendants* shall be entitled to a *total of 20* peremptory challenges.
>
> . . .
>
> *If there is more than one defendant*, the Court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

Super. Ct. Crim. R. 24(b) (emphasis added). In this case, since he was tried alone, *Dawson received all twenty* of the peremptory challenges provided for in Rule 24. In effect Dawson contends that this Court should find the trial judge abused his discretion by following Rule 24 precisely, at least through the first panel of prospective jurors.

We find that Dawson has been "unable to establish either abuse of discretion or actual prejudice" as a result of the Superior Court's decision not to grant him additional peremptory challenges. *DeShields v. State*, 534 A.2d at 636. The record reflects that the Superior Court complied with the mandatory requirements of Rule 24(b) and

afforded Dawson twenty peremptory challenges. *Id.* The record also reflects that no antagonistic juror was seated, after Dawson had exercised all of his peremptory challenges. *Id.* The Superior Court's decision not to grant Dawson additional peremptory challenges, until after the first jury panel had been exhausted, is affirmed. *Id.*; Super. Ct. Crim. R. 24(b).

EVIDENCE OF EARLIER BURGLARY

Dawson was tried on thirteen counts of a fifteen-count indictment. Two counts of the indictment charged Dawson with Burglary in the Second Degree and Misdemeanor Theft at the Seeney home, a brief time before the murder of Madeline Kisner. Dawson entered a guilty plea to those charges prior to trial.

The State offered evidence of the Seeney burglary, during the guilt/innocence phase of Dawson's trial. With that evidence, the State sought to establish that Dawson was in the Kenton area at the time Madeline Kisner was murdered. Dawson acknowledges that evidence establishing that he was within one-half mile of the Kisner home on the morning of Madeline Kisner's murder was relevant to the State's case. However, Dawson submits that the Superior Court erred in admitting evidence that he burglarized the Seeney residence, while he was in the Kenton area.

In the Superior Court, Dawson argued that evidence of this "other crime" at the Seeney residence was inadmissible according to D.R.E. 404(b). Alternatively, Dawson argued that, if the evidence of the Seeney burglary was not precluded by D.R.E. 404(b), it was nevertheless

inadmissible, because the probative value of that evidence was outweighed by its prejudicial nature. D.R.E. 403. The State argued that the evidence of this "other crime" was admissible as an integral part of the immediate context of the crimes for which Dawson was being tried, and, therefore, was not governed by Rule 404(b). *United States v. Bass*, 794 F.2d 1305, 1312 (8th Cir. 1986).

The Superior Court assumed, without deciding, that D.R.E. 404(b) was applicable to the State's request to introduce evidence of the Seeney burglary. The Superior Court articulated two reasons for its decision. First, it concluded that even if the State's position was correct, and evidence of the Seeney burglary was not within the scope of 404(b), Rule 403 nevertheless required the Court to determine if the probative value of the evidence was outweighed by its prejudicial nature. Second, the Superior Court decided to "give Dawson the benefit of all protections afforded by the Delaware Uniform Rules of Evidence."

After articulating the basis for its analysis, the Superior Court carefully applied the guidelines set forth by this Court in *Getz v. State*, Del. Supr., 538 A.2d 726 (1988). In doing so, the Superior Court stated, in part:

> The probative value of the evidence must be balanced against the danger of unfair prejudice. In the course of this case the defense has stated it does not dispute the Kisner burglary; thus, there is no danger here that the jury may unfairly infer the defendant committed the Kisner burglary merely because of the Seeney burglary.
>
> The Seeney burglary was a property crime that is not inflammatory in nature. The jury has already heard testimony relating to various thefts of automobiles which also were not inflammatory.
>
> I am satisfied that the precautionary instructions are likely to be effective in limiting the purpose for which the evidence may be used. I therefore conclude that the probative value is not substantially outweighed by the danger of unfair prejudice to the defendant.

We find no abuse of discretion. The record supports the Superior Court's conclusion that the probative value of the evidence of the Seeney burglary was not outweighed by its prejudicial nature. The Superior Court's decision which permitted the State to introduce evidence of the "other crimes" by Dawson at the Seeney residence with an appropriate precautionary instruction to the jury, is affirmed.[21] *Getz v. State*, Del Supr., 538 A.2d 726 (1988).

EVIDENCE OF TWO CAR THEFTS

At trial and on appeal, Dawson asserts that the Superior Court erred in permitting the State to introduce

---

[21] The following precautionary instruction was given to the Dawson jury:

> "Evidence has been offered concerning [Dawson's] participation in a burglary and theft from the residence of Frank and Dorothy Seeney. This evidence has been offered for a limited purpose. You may not use that evidence as proof that the defendant was a bad person and therefore probably committed the offenses he is charged with. You may use the evidence only to help you in deciding whether the defendant was the person who committed the offenses charged in the indictment now on trial.

evidence concerning the theft of two motor vehicles. During the guilt/innocence phase of Dawson's trial, the State presented evidence to show that McCoy, Nave and Irwin, who escaped from the Delaware Correctional Center with Dawson, stole a car in Smyrna and travelled north in it. That car, a 1965 Mustang, was stolen from the northern part of the Town of Smyrna prior to 5:45 a.m. It was found abandoned just south of Fieldsboro that same morning. McCoy's fingerprint and Nave's address book were recovered from the vehicle. Only McCoy, Nave and Irwin were observed in Fieldsboro by Dill, in the early morning hours of December 1, 1986.

The State also offered evidence to show that another vehicle was stolen from Smyrna contemporaneously with the theft of the 1965 Mustang. That other vehicle, a 1979 Oldsmobile Starfire, was stolen from the opposite side of the town of Smyrna. After it was stolen, the 1979 Starfire was first noticed, between 8:00 and 9:00 a.m., near the Town of Kenton, west of Smyrna.

Dawson argues that the theft of the 1965 Mustang by McCoy, Nave and Irwin was not relevant to any issue in his case. Dawson also submits that there was no direct evidence connecting him to the theft of the 1979 Oldsmobile Starfire. The State contends that the evidence of both car thefts was material to a central issue in the trial, i.e., whether Dawson, or someone else, killed Madeline Kisner. The State submits that this issue was framed at the outset of the trial by Dawson's counsel in his opening statement to the jury.[22]

---

[22] You are going to hear certain evidence which is not in dispute. There will be evidence and the defendant does not

(Continued on following page)

In his opening statement, Dawson's counsel represented that Dawson would not dispute the evidence that

---

(Continued from previous page)

dispute the fact that on December 1st, 1986 he escaped from the Department of Correction in Smyrna, Delaware. There will be evidence and the defendant does not dispute the fact that on the morning of December 1st, 1986 he was inside the Kisner home and that he didn't have permission to be there. There will be evidence and the defendant does not dispute the fact that he stole some coins from the Kisner home.

There will be evidence and the defendant does not dispute the fact that he tied Madeline Kisner's hands with her shoe strings and there will be evidence and the defendant does not dispute the fact that he stole Madeline Kisner's car that day, but, ladies and gentlemen, the fact that David Dawson might be an escapee, the fact that David Dawson might be a thief, doesn't automatically mean, ladies and gentlemen, that he is a murderer, and that sounds bad, doesn't it?

You are also going to hear evidence, ladies and gentlemen, that the statement which Mr. Dawson gave which will tell you that on the first of December, '86 that when he escaped he escaped with the three other individuals: Mark McCoy, Larry Nave and Richard Irwin. There will be evidence that the individuals separated sometime on December 1st, '86 and that these three individuals were subsequently captured on or about December 23rd far away in or near Arizona.

There will be evidence when defendant gave his statement on January 8, 1987 he indicated that he was in the home of Mrs. Kisner and he tied Mrs. Kisner and he will further indicate to you in that statement that when he left the Kisner home to get gas that Nave, McCoy and Irwin were in that house and that when he left Mrs. Kisner was alive and when he returned Mrs. Kisner was dead, and his three friends were gone and when you look at that statement and you read that statement you are going to see that his reaction at that time was that he cried, he collapsed, he touched the bloody body of Mrs. Kisner.

he was in the Kisner residence, that he stole money from Madeline Kisner, that he bound her hands with her shoe strings and that he stole her car. However, Dawson's counsel also told the jury that they would hear evidence, in the form of a statement given by Dawson to the police that he left Madeline Kisner alive in her residence with the other three escapees, McCoy, Nave and Irwin. According to Dawson's statement to the police, when he returned to the Kisner home, Madeline Kisner was dead and the other escapees were gone.

The Superior Court ruled that the State was entitled to introduce evidence that the other three escapees travelled together in the stole 1965 Mustang in the opposite direction of the Kisner home. The Superior Court also ruled that the State could introduce direct and circumstantial evidence to support its contention that Dawson had an independent means of transportation to the vicinity of the Kisner home via the 1979 Oldsmobile Starfire. *Renzi v. State*, Del. Supr., 320 A.2d 711 (1974); *Henry v. State*, Del. Supr., 298 A.2d 327, 330 (1972); D.R.E. 404(b). The record reflects the relevancy of the evidence of both car thefts, in view of Dawson's defense that the other escapees had murdered Madeline Kisner. D.R.E. 402. We find no abuse of discretion in these evidentiary rulings by the Superior Court.[23]

---

[23] We note that Dawson's statement to the police was *not* introduced into evidence by either party, and that Dawson did not testify. Nevertheless, the State had the burden of proving the charges against Dawson and was entitled to present evidence that Dawson was alone when he murdered Madeline Kisner during its case-in-chief.

PROSECUTORIAL DISCRETION TO SEEK CAPITAL PUNISHMENT

Dawson argues that his death sentence should be commuted to life imprisonment, without the possibility of probation or parole, because penalty hearings were not held in other cases for defendants who were also convicted of Murder in the First Degree. According to Dawson, the current Delaware practice, whereby penalty hearings are not held following all first degree murder convictions, gives the prosecutor unbridled discretion in choosing cases in which to seek a death sentence.

Following a conviction of Murder in the First Degree, the Delaware statute requires the jury to make two unanimous determinations: first, that at least one statutory aggravating factor is present; and second, that a sentence of death be imposed, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense, and the character and propensities of the offender. 11 *Del. C.* § 4209. Consequently, during a penalty hearing, the prosecutor must prove the existence of both statutory requirements, beyond a reasonable doubt, to the jury's unanimous satisfaction.

"Although the prosecutor operates within an adversary system, his duty is to seek justice, not merely convictions." *Sexton v. State*, Del. Supr., 397 A.2d 540, 544 (1979). Similarly, the duty to seek justice requires the prosecutor to refrain from proceeding with a death penalty hearing, if the prosecutor makes an independent good faith determination that the State cannot meet its statutory burden of proof. "The capacity of prosecutorial discretion to provide individual justice is 'firmly entrenched in American

law.' " *McCleskey v. Kemp*, 107 S.Ct. 1756, 1777 (1987) (quoting 2 W. LaFave & D. Israel, Criminal Procedure § 13.2(a), p. 160 (1984)). The United States Supreme Court has recognized that "a prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case." *Id.* At the same time, that Court recognized "the power to be lenient [also] is the power to discriminate," . . . but a capital-punishment system that did not allow for discretionary acts of leniency "would be totally alien to our notions of criminal justice." *Id.*

The question raised by Dawson is whether historically in Delaware, or in his particular case, there has been an abuse of prosecutorial discretion in seeking the death penalty. In examining claims of prosecutorial abuse in this area of the law, this Court has recognized a rebuttable presumption that criminal prosecutions, including decisions to seek the death penalty, are undertaken in good faith and in a nondiscriminatory manner. *Albury v. State*, Del. Supr., 551 A.2d 53, 62 (1988). Dawson has presented no evidence to support his allegation of historical abuse of prosecutorial discretion in Delaware, when deciding whether to seek the death penalty following a first degree murder conviction. With respect to his own case, for the reasons hereinafter stated, the record reflects overwhelming evidence to support the prosecutor's decision to seek the death penalty for Dawson. Thus, we conclude that Dawson has failed to sustain his burden of persuasion on this issue. *Id.*

EVIDENTIARY RULINGS DURING PENALTY HEARING

Following Dawson's convictions, the State represented that, during the penalty hearing, it intended to

introduce: (1) expert testimony about the origin and nature of the Aryan Brotherhood, (2) testimony that Dawson referred to himself as Abaddon, had the name "Abaddon" tattooed in red ink across his stomach and that the name means "one of Satan's disciples" or "angel of the bottomless pit,"[24] (3) photographs of Dawson's body depicting his tattoos, and (4) a picture of the swastika that Dawson painted on the wall of his prison cell. Dawson's counsel renewed the objections originally raised, in part, by the motion *in limine*. The defense argued that none of the evidence proffered by the State should be admitted during the penalty phase because it was inflammatory and irrelevant. Dawson's counsel also renewed the argument that if the State were allowed to introduce

---

[24] During the guilt phase of Dawson's trial, the Superior Court was not required to rule upon the admissibility of evidence relating to the Aryan Brotherhood, or the swastikas because the State did not seek to introduce such evidence. However, the Superior Court was called upon to address the admissibility of the name "Abaddon" and its meaning, when the State sought to introduce the postcard found in the Kisner automobile that had been signed "Abaddon." The Superior Court ruled:

> Given the other evidence that is available to link the defendant exclusively to the Kisner vehicle, the [Superior] Court is going to direct that there be no reference during the guilt/innocence phase to the name Abaddon. . . .
>
> I will allow, however, reference to the postcard during the State's case in chief and also indication through testimony that it was signed [with] a nickname known to be used by the defendant.

this evidence, Dawson's First Amendment rights of freedom of association and freedom of religion and his right to due process would be violated.

After considering the parties' arguments, on the issue of whether evidence concerning the nature of the Aryan Brotherhood and Dawson's membership in that organization would be relevant during the penalty proceeding, the Superior Court stated:

> Well, I will narrow the issues to some extent. [I] find that membership or the act of joining an organization of any particular kind, whether it be the Aryan Brotherhood or the Boy Scouts of America can be probative of character, at least to some extent. The real issue before the Court is whether the probative value is outweighed by the danger of unfair prejudice. So let's focus the argument that way.

Immediately after this preliminary ruling, all of the attorneys requested a recess. Following the recess, the parties executed a stipulation describing the Aryan Brotherhood, and the State agreed not to call an expert witness to explain the origin and nature of that organization. The stipulation, which was received as evidence without further objection, read:

> The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.

In addition to admitting the stipulation into evidence during the penalty hearing, the State called Detective Joseph Huttie ("Huttie") to testify, with the aid of the

photograph, that Dawson's right hand bore a tattoo with the name Aryan Brotherhood printed above and below a black and red diamond shaped symbol.

In this appeal, Dawson's counsel argues that no evidence concerning the Aryan Brotherhood should have been admitted during the penalty hearing. According to Dawson's counsel, after the Superior Court's adverse preliminary decision that evidence concerning the Aryan Brotherhood would be relevant to Dawson's character, counsel was "forced" to enter the stipulation in order to guarantee that a relatively "sterile" description of the Aryan Brotherhood would be presented to the jury. Dawson's counsel submits that the stipulation simply characterized that organization and that the objection to the admissibility of any evidence about the Aryan Brotherhood was never withdrawn.

Over objections by Dawson's counsel, the Superior Court also ruled that the State would be permitted to introduce evidence of Dawson's use of the nickname Abaddon and what that name means during the penalty hearing. Huttie testified that, when Dawson was arrested, a photograph was taken showing the name Abaddon tattooed across Dawson's stomach. Huttie also testified that Webster's dictionary defines Abaddon as "angel of the bottomless pit." Patty Elizabeth Dennis ("Dennis") also testified concerning the name Abaddon during the penalty hearing. She stated that while at the Zoo Bar on the night of December 1, 1986, Dawson introduced himself to her as "Abaddon" and told her that the name meant "one of Satan's disciples."

After an inquiry as to the relevance of the swastika evidence to Dawson's character, the Superior Court ruled that the swastika evidence could not be introduced by the State at the penalty hearing without leave of the court. Following that determination, the State never sought to introduce any evidence concerning swastikas. Consequently, the question of whether such evidence could have been admitted is not in issue.

In a penalty hearing for a defendant found guilty of murder in the first degree, the sole issue is whether or not the death penalty should be imposed. The jury is called upon to make an individualized determination with respect to the appropriateness of the death penalty, based on the defendant's character and the circumstances of the crime. *Zant v. Stephens*, 462 U.S. 862, 879 (1983). Admissible evidence includes "matters relating to any mitigating circumstances and to any aggravating circumstances." 11 *Del. C.* § 4209(c). A jury in a capital case may consider nonstatutory aggravating circumstances under the death penalty, and may take into account "all specific circumstances of the crime and the defendant." *State v. White*, Del. Supr., 395 A.2d 1082, 1089 (1978); *Deputy v. State*, Del. Supr., 500 A.2d 581 (1985), *cert. denied*, 480 U.S. 940 (1987). Accordingly, a very wide range of evidence is admissible in a penalty hearing. *Flamer v. State*, Del. Supr., 490 A.2d 104 (1984), *cert. denied*, 464 U.S. 865 (1983). In this appeal, Dawson challenges the Superior Court's determination that evidence regarding the Aryan Brotherhood and the name Abaddon would properly be admissible as relevant to his character during the penalty hearing.

During the penalty hearing, the State contended that Madeline Kisner's murder was in keeping with the

incorrigible nature of Dawson's character. The State argued that Dawson's life demonstrated an almost complete rejection of the rules which govern a civilized society. The State sought to prove its contention about Dawson's character in several ways.

The State presented evidence of Dawson's extensive criminal history.[25] That history revealed Dawson's repeated convictions for various crimes, resulting in a lifetime of almost continuous incarceration, beginning with Dawson's confinement as a juvenile at the age of thirteen. The State argued that Dawson's selection of the name Abaddon was – like his career of crime – characteristic of the persona chosen by Dawson. The State argued that Dawson's decision to join a prison gang, while he was incarcerated as an adult, was – like his escapes – characteristic of his lawless nature and his denouncement of rehabilitation while incarcerated.

The Superior Court ruled that Dawson's use of the nickname Abaddon was relevant to his character. The record supports that decision. Dawson identified himself as Abaddon. Dawson signed a postcard with that name. He had that name tattooed across his stomach. Dawson introduced himself to Dennis as Abaddon, and explained his understanding of that name to her. What Dawson

---

[25] This history included Dawson's commitment to a juvenile correctional facility at age thirteen, five commitments or recommitments to the Division of Juvenile Corrections dating from October 1968, the determination that he was not amenable to the Family Court processes, fourteen prior felony convictions, three escapes from maximum security juvenile institutions, three adult escapes, and twenty-four conduct violations resulting in sanctions against him as an inmate.

thought the name Abaddon meant and how it is commonly understood by others was relevant to his character because it was a reflection of how Dawson viewed himself and how he wanted to be viewed, even within hours after Madeline Kisner's murder.[26] *Cf. Commonwealth v. Abu-Jamal*, Pa. Supr., 555 A.2d 846, 859 (1989).

The Superior Court ruled that evidence of Dawson's membership in the Aryan Brotherhood, as well as the nature and the origin of that group, was relevant to Dawson's character. The record also supports that decision. Dawson identified himself as a member of the prison gang known as the Aryan Brotherhood by having its name and logo tattooed on his body. Dawson's affiliation with this type of organization was not only indicative of how he identified himself and how he wanted to be identified by others, but again was characteristic of his lawless nature and rejection of rehabilitation during his incarceration. *See United States v. Abel*, 469 U.S. 45 (1984).

Dawson argues that even if the evidence about the Aryan Brotherhood and the name Abaddon were relevant to his character, the use of that evidence against him during the penalty proceeding violated his rights of free speech and association. U.S. Const. amend. I; Del. Const. art. I, §§ 5 and 16. *See, e.g., Brandenburg v. Ohio*, 395 U.S.

---

[26] Huttie was permitted to testify that Webster's Dictionary defined Abaddon as the "angel of the bottomless pit." This definition has a biblical origin. *See Revelations* 9:11 (King James). Dennis testified that Dawson told her Abaddon meant "one of Satan's disciples." Dawson's understanding of the meaning of his nickname is therefore consistent with its commonly accepted meaning.

444 (1969); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Aptheker v. Secretary of State*, 37 U.S. 500 (1964); *Noto v. United States*, 367 U.S. 290 (1961); *Scales v. United States*, 367 U.S. 203 (1961). Additionally, Dawson argues that by improperly injecting race and religion into his trial, his constitutional right to due process was violated. *Baldwin v. Alabama*, 472 U.S. 372 (1985); *Weddington v. State*, Del. Supr., 545 A.2d 607, 615 (1988); *Brokenbrough v. State*, Del. Supr., 522 A.2d 851 (1987). The State denies that it presented any issue of race, religion or political affiliation to the jury in violation of Dawson's rights.

During the penalty phase of Dawson's trial, the jury had to decide whether Dawson should be executed or imprisoned for the rest of his life. Before recommending a death sentence, it was mandatory for the jury to find that the State had proven the existence of at least one statutory aggravating factor. In Dawson's case, the jury found that the State had proven three statutory aggravating factors.[27] The jury was also required to make an *individualized* determination of whether Dawson should be executed or incarcerated for life, based upon Dawson's character, his record and the circumstances of the crime.

---

[27] The three statutory aggravating circumstances which the jury found to exist in Dawson's case were:

1. The murder was committed by a person who had escaped from a place of confinement.
2. The murder was committed while the defendant was engaged in the commission of burglary and/or robbery.
3. The murder was committed for pecuniary gain.

11 *Del. C.* § 4209(e)(a), (j) and (o).

Booth v. Maryland, 482 U.S. 496 (1987) (emphasis in original) (citations omitted); *Zant v. Stephens* [sic], 462 U.S. at 879; *Blystone v. Pennsylvania*, 110 S.Ct. 1078, 1083 (1990); *Penry v. Lynaugh*, 109 S.Ct. 2934 (1989); *State v. White*, Del Supr., 395 A.2d 1082 (1978).

Because of the duty to be performed during a penalty hearing, "it is desirable for the jury to have as much information before it as possible when it makes the sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 204 (1976). Nevertheless, "a death sentence based upon consideration of 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant' would violate the Constitution." *Baldwin v. Alabama*, 472 U.S. 372, 382 (1985) (quoting *Zant v. Stevens*, 462 U.S. at 885). However, "[p]unishing a person for expressing his views or for associating with certain people is substantially different from allowing . . . evidence of [the defendant's] character [to be considered] where that character is a relevant inquiry." *Commonwealth v. Abu-Jamal*, 555 A.2d at 859. Dawson's character was relevant to the jury's determination of whether he should be executed.

> *Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion.

California v. Brown, 107 S.Ct. 837, 841 (1987).

During the penalty hearing, the evidence the State presented to the jury regarding the Aryan Brotherhood and the name Abaddon properly focused the jury's attention on Dawson's character.[28] The State did not offer that evidence in order to improperly appeal to the jurors' passions and prejudices concerning race, religion, or political affiliation. *Cf. United States v. Abel*, 469 U.S. 45 (1984); *Weddington v. State*, Del. Supr., 545 A.2d 607 (1988); *Brokenbrough v. State*, Del. Supr., 522 A.2d 851 (1987); *Hooks v. State*, Del. Supr., 416 A.2d 189 (1980). The State's evidence, briefly defining the Aryan Brotherhood and the name Abaddon, was presented in a manner which did not shift the jury's attention away from the issue of Dawson's character. *Booth v. Maryland*, 482 U.S. 496 (1987). The context of the State's evidence was necessary to explain Dawson's view of himself and how he wanted to be viewed by others.[29] *Id.*

---

[28] The State did not contend that Dawson's membership in the Aryan Brotherhood or use of the name Abaddon provided the motivation for the murder. *Compare Barclay v. Florida*, 463 U.S. 939, 948 (1983). *See also United States v. Mills*, 704 F.2d 1553, 1559 (11th Cir. 1983).

[29] In his closing argument during the penalty hearing, the prosecutor stated:

> Dawson has taken the name Abaddon. We didn't tell you that because necessarily, or even for any religious reason, but it tells you something about what Abaddon means: The angel of the bottomless pit, one of Satan's disciples. What does that say about how he views himself, how he would like to be seen by other people? What purpose could there be in calling himself the angel of the bottomless pit,

(Continued on following page)

We hold that the evidence relating to the Aryan Brotherhood and the name Abaddon was properly considered by the jury during the penalty hearing. That evidence was relevant to Dawson's character. Its admission did not violate Dawson's constitutional rights. *Booth v. Maryland*, 482 U.S. 496 (1987); *Baldwin v. Alabama*, 472 U.S. 372 (1985); *United States v. Abel*, 469 U.S. 45 (1984); *Zant v. Stevens*, 462 U.S. 862 (1983); *State v. White*, Del. Supr., 395 A.2d 1082 (1978).

DEATH PENALTY INSTRUCTIONS

Dawson's next argument relates to the trial judge's comments to the jury at the inception of the penalty hearing. As part of his *introductory* remarks, the trial judge stated:

> Members of the jury, the Delaware Criminal Code provides that upon conviction of a defendant of murder in the first degree the Superior Court shall conduct a separate hearing to determine whether the defendant shall be sentenced to death or to life imprisonment without benefit of probation or parole or without any other

---

(Continued from previous page)

Abaddon, other than to tell people you better watch out for me. I am bad.

This is not just a passing fancy, a fad, a phase in his life. It is a direction his life has turned. It is not just a nickname he goes by. He has marred his body with that tattoo: Abaddon. He is serious about this ladies and gentlemen. All the way across his stomach A B A D D O N in block letters that high (indicating). He relishes that connotation, that impression of evil: The angel of the bottomless pit.

> reduction of sentence. It is your function as the jury in this case to determine if the defendant will be sentenced to death or to life imprisonment without benefit of probation or parole or any other reduction.
>
> The law does not require you under any circumstances to recommend a sentence of death. *Instead, you may in your discretion and regardless of circumstances recommend imposition of the death penalty.* You are required, however, to consider a sentence of death as a possible punishment in this case. I will give you detailed instructions on the applicable law at the conclusion of the evidence. (emphasis added).

Both parties agree that what the trial judge should have said, and apparently meant to say, was that "regardless of the circumstances, the jury could recommend *against* the imposition of death penalty."

The defense did not raise an objection to this comment at any time during the penalty hearing. Nevertheless, Dawson now argues that the trial court's introductory remarks at the penalty hearing "invited and authorized unbridled jury discretion in the penalty determination process of a capital murder case and constituted a clear violated of [his] rights under the eighth and fourteenth amendments." *Furman v. Georgia*, 408 U.S. 238 (1972); *State v. Dickerson*, Del. Supr., 298 A.2d 761, 764 (1972). This Court will generally decline to review contentions which were not fairly presented to the trial court for decision. Supr. Ct. R. 8.

However, this Court will review an issue not raised at trial if it constitutes plain error. Supr. Ct. R. 8; *Goddard v. State*, Del. Supr., 382 A.2d 238, 242 (1977).

> Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process. Furthermore, the doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.

Wainwright v. State, Del. Supr., 504 A.2d 1096, 1100 (1986) (citations omitted). In reviewing Dawson's present claim of plain error, we must determine whether the trial judge's preliminary comments were erroneous as a matter of law and, if so, whether that error so affected Dawson's substantial rights that it jeopardized the fairness and integrity of the penalty hearing. *Id.*

As a general rule, a defendant in a criminal proceeding is not entitled to a particular form of jury instruction, but he does have the unqualified right to a correct statement of the substance of the law. *Flamer v. State*, 490 A.2d at 128. "When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process." *Walton v. Arizona*, 58 LW 4992, 4995 (1990). Clearly, the trial judge misspoke when he initially told the jury that it could recommend the death sentence for Dawson, regardless of the circumstances. Since the jury did, in fact, recommend the imposition of the death penalty, we must examine the effect of the trial judge's erroneous remark.

In undertaking this evaluation, we are guided by the well-established rule "that a single instruction to a jury may not be judged in artificial isolation, but must be

viewed in the context of the overall charge." *Boyde v. California*, 110 S.Ct. 1190, 1196 (1990) (quoting *Cupp v. Naughten*, 414 U.S. 141 (1973)); *Probst v. State*, Del. Supr., 547 A.2d 114, 119 (1988). Jury instructions do not need to be perfect. *Whalen v. State*, Del. Supr., 492 A.2d 552, 559 (1985). "Some inaccuracies and inaptness in statement are to be expected." *Flamer v. State*, 490 A.2d at 128 (citing *Baker v. Reid*, Del. Supr., 57 A.2d 103, 109 (1947)). "A trial court's jury charge will not serve as grounds for reversible error if it is 'reasonably informative and not misleading, judged by common practices and standards of verbal communication.' " *Id.* The proper focus of our inquiry in Dawson's case is whether there is a reasonable likelihood that the trial court's initial misstatement undermined the ability of the jury to accurately perform its duty in returning a sentence recommendation. *Boyde v. California*, 110 S.Ct. at 1198; *Flamer v. State*, 490 A.2d at 128. *See also Whalen v. State*, 492 A.2d at 559.

"Obviously, instructions play a critical role in the penalty phase of a capital case." *Whalen v. State*, 492 A.2d at 559. This Court and the Untied States Supreme Court have held that the sentencing procedures in capital cases must not create "a substantial risk that the [death penalty will] be inflicted in an arbitrary and capricious manner." *Id.* (citing *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion)). Although discretion in sentencing may not be eliminated completely, it must be "directed and limited". *Id. See also, Franklin v. Lynaugh*, 108 S.Ct. 2320, 2331 (1988). "Thus, it is the trial judge's duty to guide the jury's discretion by ensuring that they understand the bases for imposing a death sentence, and comprehend their responsibilities in applying such criteria. It is only

through the careful use of jury instructions that the judge properly discharges this function." *Whalen v. State*, 492 A.2d at 559.

Under Delaware law, a separate penalty hearing is conducted to determine whether a defendant, who has been found guilty of Murder in the First Degree, will be sentenced to death or life imprisonment without probation or parole. 11 *Del. C.* § 4209(b)(1). *Whalen v. State*, 492 A.2d at 559-60. Before recommending the imposition of a death sentence, the jury must engage in a two-step analysis. *Id.* First, it must make an initial finding of the existence of at least one statutory aggravating circumstance. *Id.* Second, it must weigh the aggravating circumstances against any mitigating circumstances found to exist. Unless the jury unanimously concludes that the aggravating circumstances outweigh the mitigating circumstances, the death penalty cannot be imposed. *Id.* The trial court's instructions to the jury must clearly convey that this two-part analysis still permits the jury to recommend against the death penalty no matter that aggravating circumstances are found to exist. *Id.*

In Dawson's case, the trial judge's misstatement was not made during his formal instructions to the jury. Rather, it occurred during his brief preliminary comments, intended to orient the jury, at the outset of the penalty hearing. Even so, during these prefatory remarks, the trial judge accurately told the jury that the penalty hearing was being conducted "to determine *whether* the defendant shall be sentenced to death or to life imprisonment." At the same time the trial judge accurately stated to the jury that "the law does not require you under any circumstances to recommend a sentence of death." The

trial judge ended his introductory remarks by telling the jury that he would give them "detailed instructions on the applicable law at the conclusion of the evidence" presented during the penalty hearing.

The sentencing decision was not ultimately submitted to the jury in Dawson's case on an impermissible legal theory. *Cf. Stromberg v. California*, 283 U.S. 359 (1931). Following the attorneys' closing arguments, the trial judge gave specific instructions concerning the law to be applied by the jury during the penalty phase. The jurors were properly advised that they could not impose a sentence of death unless they found beyond a reasonable doubt at least one statutory aggravating circumstance and unanimously recommended a sentence of death, after weighing all relevant evidence in aggravation and mitigation of the crime, and the particular characteristics and propensities of the defendant. During these formal instructions, the trial judge correctly instructed the jury that "regardless of the circumstances, they could recommend *against* the death penalty."[30] In addition six

---

[30] During the penalty proceeding, following the closing arguments, the Superior Court instructed the jury in part, as follows:

> I shall now instruct you as to the applicable principles of law governing the punishment to be imposed in this case. No single one of these instructions states all of the law applicable to this determination. Therefore, you must listen to and consider all of these instructions together. You are to apply the law to the facts and in this way decide the punishment to be imposed in this case. . . .

(Continued on following page)

(Continued from previous page)

It is your function as the jury in this case to determine if the defendant will be sentenced to death or to life imprisonment without benefit of probation or parole or any other reduction. The law does not require you under any circumstances to recommend a sentence of death. *Instead, you may, in your discretion and regardless of the circumstances, recommend against imposition of the death penalty.* You are required, however, to consider a sentence of death as a possible punishment in this case.

The Applicable portion of Delaware law provides: Any person who is convicted of first degree murder shall be punished by death or by imprisonment for the remainder of his or her natural life without benefit of probation or parole or any other reduction, said penalty to be determined in accordance with this section. . . .

A sentence of death should not be imposed unless the jury finds:

1. Beyond a reasonable doubt at least one statutory aggravating circumstance; and

2. Unanimously recommends, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that a sentence of death be imposed. Where the jury submits such a finding and recommendation, the Court shall sentence the defendant to death. . . .

If you have a reasonable doubt about the existence of a statutory aggravating circumstance, you must give the defendant the benefit of that reasonable doubt and find that such statutory aggravating circumstance does not exist. . . .

(Continued on following page)

copies of those written instructions, which accurately set forth the law, were provided to the jury.[31]

After reviewing the jury instructions in their entirety, we find that the trial judge's misstatement during his

(Continued from previous page)

If you do unanimously find beyond a reasonable doubt that one or more statutory aggravating circumstances exist, you must then weight [sic] and consider the mitigating circumstances and the aggravating circumstances including, but not limited to, the statutory aggravating circumstance or circumstances that you have already found to exist.

You must weigh all relevant evidence in aggravation and mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender.

In weighing the aggravating and mitigating circumstances, it is not a question of mere numbers of each, but rather the relative weight of each as compared to the other. In order to recommend a sentence of death, you must unanimously find that the aggravating factors outweigh the mitigating factors. *Regardless of the circumstances, you in your discretion may recommend that a sentence of life imprisonment without probation or parole be imposed.*

[31] Members of the jury, you will have with you in the jury room all of the exhibits which have been introduced in the case and I will also be providing you with six copies of this instruction which I have just read along with the interrogatories for you to sign and a copy of the indictment Counts 3 through 15 for your reference.

preliminary remarks was not prejudicial to any of Dawson's substantial rights and did not jeopardize the fairness or the integrity of the penalty hearing. *California v. Brown*, 107 S.Ct. 837, 839-40 (1987). The trial court's actual instructions to the jury accurately, and on more than one occasion, advised the jury that it retained the option to recommend *against* the death penalty for Dawson, despite any aggravating factors it found to exist. *Flamer v. State*, 490 A.2d at 128. *Cf. Whalen v. State*, 492 A.2d at 559-60. We conclude that the trial court's erroneous introductory statement to the contrary was harmless beyond a reasonable doubt. *Id.* We find no reasonable likelihood that the trial court's misstatement at the commencement of the penalty hearing caused the Dawson jurors to misinterpret the actual and accurate instructions, which were subsequently given to them orally and in writing. *Boyde v. California*, 110 S.Ct. 1190, 1197-98 (1990); *Flamer v. State*, 490 A.2d at 128.

DEATH PENALTY REVIEW

Finally, we undertake our statutory obligation to review the imposition of the death penalty in this case. *See Riley v. State*, 496 A.2d at 1026; *Flamer v. State*, 490 A.2d at 137-45. 11 *Del. C.* § 4209(g)(2) provides as follows:

> The Supreme Court shall limit its review under this section to the recommendation on an imposition of the penalty of death and shall determine:
>
> a. Whether, considering the totality of evidence in aggravation and mitigation which bears upon the particular circumstances or details of the offense and the character and

> propensities of the offender, the death penalty was either arbitrarily or capriciously imposed or recommended, or disproportionate to the penalty recommended or imposed in similar cases arising under this section.
>
> b. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection (e) of this section and, where applicable, § 636(a)(2)-(7) of this title.

In performing our review, in accordance with the statute, we are cognizant that "death as a punishment is unique in its severity and irrevocability." *Furman v. Georgia*, 408 U.S. 238 (1972).

Addressing subparagraph b of Section 4209(g)(2) first, the Dawson jury found the existence of three statutory aggravating circumstances. The first statutory aggravating circumstance found by the jury was that the murder was committed by a person who had escaped from a place of confinement. During the penalty hearing, the Superior Court quite properly instructed the jury that this statutory aggravating circumstance had been established beyond a reasonable doubt, as a matter of law, by virtue of Dawson's convictions at trial. Dawson had been convicted of violating 11 *Del. C.* § 636(a)(7) as charged in Count 13, 11 *Del. C.* § 636(a)(6) as charged in Count 11, and 11 *Del. C.* § 636(a)(2) as charged in Count 9.[32] The

---

[32] These respective sections of the *Delaware Code* provide in pertinent part that:

(Continued on following page)

second statutory aggravating circumstance was that the killing occurred during the commission of a burglary and/or robbery. The Superior Court also properly instructed the jury that Dawson's felony murder conviction had established this statutory aggravating circumstance, as a matter of law. *See Deputy v. State*, Del. Supr., 500 A.2d 581, 602 (1985), *cert. denied*, 480 U.S. 940 (1987). The third statutory aggravating circumstance was that the murder was committed for pecuniary gain. This issue was submitted to the jury. The jury unanimously found that it had been established beyond a reasonable doubt. We conclude that the evidence in the record supports the jury's findings that three of the statutory aggravating

---

(Continued from previous page)

11 *Del. C.* § 636(a)(7):

> A person is guilty of Murder in the First Degree when he causes the death of another person . . . in the course of and in furtherance of the commission . . . of escape . . . after conviction.

11 *Del. C.* § 636(a)(6):

> A person is guilty of Murder in the First Degree when he, with criminal negligence, causes the death of another person in the course of and in furtherance of the commission or attempted commission of rape, kidnapping, arson in the first degree, robbery in the first degree, burglary in the first degree, or immediate flight therefrom.

11 *Del. C.* § 636(a)(2):

> A person is guilty of Murder in the First Degree when, in the course of and in furtherance of the commission or attempted commission of a felony or immediate flight therefrom, he recklessly causes the death of another person.

circumstances enumerated under Section 4209(e) had been established beyond a reasonable doubt in Dawson's case.

Two additional inquiries are required by subparagraph a of Section 4209(g)(2): first, whether the jury's imposition of the death penalty was either arbitrary or capricious, and second, whether the death penalty imposed was disproportionate to the penalty imposed in similar cases arising under the statute. *Riley v. State*, Del. Supr., 496 A.2d 997, 1026 (1985). "Each question requires a consideration of the totality of evidence in aggravation and mitigation which bears upon the particular circumstances or details of the offense and the character and propensities of the offender." *Id.*; 11 *Del. C.* § 4209(g)(2).

The State's evidence with respect to the statutory aggravating circumstances established that the murder was committed by a person who had escaped from a place of confinement, the murder was committed while Dawson was engaged in the commission of burglary, and the murder was committed for pecuniary gain. The non-statutory aggravating circumstances upon which the State relied were Dawson's prior criminal record, his character and his propensities. In mitigation, Dawson offered evidence from two family members, his sister and an aunt, who testified that they loved him and that Dawson had once offered to donate a kidney to his cousin. After a careful review of the entire record, we find that the sentence of death was neither arbitrarily nor capriciously imposed by the jury. The record reflects that the weight of the statutory and non-statutory aggravating circumstances completely overwhelmed the mitigating circumstances.

The remaining question which we now address, is whether the jury's recommendation that the death penalty be imposed in Dawson's case was disproportionate to the penalty recommended in similar cases arising under our statute. We have done so by reviewing the "universe" of cases established in *Flamer*, *Riley*, and *DeShields*, as well as all of the subsequent cases falling therein, i.e., we have compared Dawson's sentence with the penalties in all first degree murder cases which have gone to trial and a penalty hearing. *Riley v. State*, 496 A.2d at 1027-28; *Flamer v. State*, 490 A.2d at 140; (Appendix I). We have also considered objective factors such as the gravity of the offense, the circumstances of the defendant's crime, and the harshness of the penalty. *See Solem v. Helm*, 463 U.S. 277, 290-92 (1983).

A definitive comparison of cases is almost impossible. *Riley v. State*, 496 A.2d at 1027; *Flamer v. State*, 490 A.2d at 144.

> "Individual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.' The capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant. It is not surprising that such collective judgments often are difficult to explain. But the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.' "

McCleskey v. Kemp, 107 S.Ct. at 1776, 1777.

We have reviewed the factual background of the applicable "universe" of cases. Dawson, like the other defendants sentenced to death in Delaware, was found guilty of committing an unprovoked, cold-blooded murder of a person who lacked the ability to defend herself, solely for pecuniary gain. *Riley v. State*, 496 A.2d at 1027. Dawson, like Billie Bailey, committed the murder while he was an escapee from a correctional institution. *Bailey v. State*, Del. Supr., 503 A.2d 1210 (1984). Moreover, the record in Dawson's case reflects the existence of not one, but three statutory aggravating circumstances, significant non-statutory aggravating circumstances and virtually no evidence of mitigation. We find that the death sentences imposed upon Dawson are not comparatively disproportionate to the sentences in the other first degree murder cases that have proceeded to a penalty hearing pursuant to the Delaware statute, and in which at least one statutory aggravating circumstance was found to exist by the jury. *See Deputy v. State*, 500 A.2d at 602.

CONCLUSION

The judgments of the Superior Court, which resulted in Dawson's convictions and sentences, including the imposition of the death sentences, are AFFIRMED.

APPENDIX I

FIRST DEGREE MURDER CASES THAT WENT TO PENALTY HEARINGS SINCE 1985

Case Name: William P. Baynard
Case No.: S84-050137, 0141
County: New Castle
Sentence: Life Imprisonment

Case Name: Randsford Bryan
Case No.: S87-11-0063
County: Sussex
Sentence: Life Imprisonment

Case Name: Vicky Chao
Case No.: IN88-031025 – 1025 & 1027, 1028
IN88-0832 – 0836
County: New Castle
Sentence: Life Imprisonment

Case Name: Carmelo J. Claudio
Case No.: IN87-030067 – 68
County: New Castle
Sentence: Life Imprisonment

Case Name: Lawrence R. Collingwood, Jr.
Case No.: K87-09-0895 – 0901
County: Kent
Sentence: Life Imprisonment

Case Name: David F. Dawson
Case No.: IK87-010834 through 0847
County: Kent
Sentence: Death

Case Name: Kenneth W. DeShields
Case No.: IS84-080075 – 1075, -1275, -2075
County: Sussex
Sentence: Death

Case Name: James M. Elliotte
Case No.: IN81-110834 & 0835
County: New Castle
Sentence: Life Imprisonment

Case Name: Edward A. Fountain, Jr.
Case No.: IN84-120293 thru 0297
IN84-121795 thru 1797
County: New Castle
Sentence: Life Imprisonment

Case Name: Randolph Graham
Case No.: IK86-010059
County: Kent
Sentence: Life Imprisonment

Case Name: Charles K. Kelly
Case No.: IN85-10-1671, 1672, 1673
County: New Castle
Sentence: Life Imprisonment

Case Name: Joyce L. Lynch
Case No.: IK88-010040
County: Kent
Sentence: Life Imprisonment

Case Name: Stanley Newell
Case No.: IN89-006109
County: New Castle
Sentence: Life Imprisonment

Case Name: Ernest Charles Parson, Jr.
Case No.: IN86-120380, 86-11136 – 1137
IN86-1144, 1147, 0381 – 0383, 1135
County: New Castle
Sentence: Life Imprisonment

Case Name: Steven B. Pennell
Case No.: IN88-120051 – 0053
County: New Castle
Sentence: Life Imprisonment

Case Name: Vincent Perry
Case No.: IN85-101668 – 1673
County: New Castle
Sentence: Life Imprisonment

Case Name: Maurice Polk
Case No.: S87-12-0093
County: Sussex
Sentence: Life Imprisonment

Case Name: Frederick James Roop
Case No.: IN84-101691, 1692
County: New Castle
Sentence: Life Imprisonment

Case Name: Reginald N. Sanders
Case No.: IK86-030898 through 0903
County: Kent
Sentence: Death

Case Name: Christie C. Shipley
Case No.: IK85-020820 and 0821
County: Kent
Sentence: Life Imprisonment

Case Name: Melvin Smart
Case No.: S84-08-0037 and S84-08-0038
County: Sussex
Sentence: Life Imprisonment

Case Name: Desi Sykes
Case No.: IK88-11005
County: Kent
Sentence: Life Imprisonment

Case Name: Richard C. Thompson
Case No.: IK86-010059
County: Kent
Sentence: Life Imprisonment

Case Name: Suzanne M. Triano
Case No.: IN84-051701
County: New Castle
Sentence: Life Imprisonment

Case Name: Frank C. Whalen, Jr.
Case No.: IK77090035, 0036; IK78-030029
County: New Castle (venue changed)
Sentence: Life Imprisonment

Case Name: Lonnie Williams
Case No.: IN89-08-0638 through 0645
IN89-09-0938 through 0943
County: New Castle
Sentence: Life Imprisonment

SUPREME COURT OF THE UNITED STATES

No. 90-6704

David Dawson,

Petitioner

v

Delaware

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Delaware.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 1, 1991

Supreme Court, U.S.
FILED
JUN 3 1991
OFFICE OF THE CLERK

No. 90-6704

In The

Supreme Court of the United States

October Term, 1990

DAVID F. DAWSON,

Petitioner,

v.

DELAWARE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Delaware

BRIEF FOR PETITIONER

LAWRENCE M. SULLIVAN
Public Defender of the
State of Delaware

BERNARD J. O'DONNELL
Assistant Public Defender
(Counsel of Record)

BRIAN J. BARTLEY
Assistant Public Defender

Office of Public Defender
820 North French Street
Wilmington, Delaware 19801
(302) 577-3230

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

33 pp

QUESTION PRESENTED

Did evidence of petitioner's constitutionally protected belief in the Aryan Brotherhood – a group identified as a "white racist prison gang" but not shown to have engaged in any unlawful activity (or indeed in any specific activity at all) – violate his First, Eighth and Fourteenth Amendment rights when such evidence was admitted as a non-statutory aggravating circumstance calling for a sentence of death in his prosecution for a murder that had no racial motivations or connections whatsoever?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE 1

STATEMENT OF CASE 4

SUMMARY OF ARGUMENT 13

ARGUMENT:

DAWSON'S SENTENCE OF DEATH IS INVALID BECAUSE THE STATE OF DELAWARE ASSERTED HIS CONSTITUTIONALLY PROTECTED BELIEFS AS AN AGGRAVATING CIRCUMSTANCE SUPPORTING THE SENTENCE OF DEATH 14

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES:

Aptheker v. Secretary of State, 378 U.S. 500 (1964) 25

Baldwin v. Alabama, 472 U.S. 372 (1985) 26

Barclay v. Florida, 463 U.S. 939 (1983) 13, 23

Brandenburg v. Ohio, 395 U.S. 444 (1969) 18

Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964) 22

Brown v. Board of Education, 347 U.S. 483 (1954) 25

Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 716 (1978) 25

Dawson v. State, 581 A.2d 1078 (Del., 1990) ..... *passim*

DeJonge v. Oregon, 299 U.S. 353 (1937) 18

Elfbrandt v. Russell, 384 U.S. 11 (1966) 25

Gebhart v. Belton, 91 A.2d 137 (Del. 1952), modified, *sub nom., Brown v. Board of Education*, 347 U.S. 483 (1954) 25

Griswold v. Connecticut, 381 U.S. 479 (1965) 18

Healy v. James, 408 U.S. 169 (1972) 18, 22

Jones v. North Carolina Prisoner's Labor Union, 433 U.S. 119 (1977) 20

National Association for the Advancement of Colored People v. Button, 371 U.S. 415 (1963) 23

National Association for the Advancement of Colored People v. State of Alabama ex rel. Patterson, 357 U.S. 449 (1958) 18

TABLE OF AUTHORITIES – Continued

Page

Noto v. United States, 367 U.S. 290 (1961).....21, 22

Pell v. Procunier, 417 U.S. 817 (1974)..... 20

Procunier v. Martinez, 416 U.S. 396 (1974)..... 20

Scales v. United States, 367 U.S. 203 (1961)..... 22

Texas v. Johnson, 491 U.S. 397 (1989).....17, 24

United States v. Abel, 469 U.S. 45 (1984) 23

United States v. Bakker, 925 F.2d 728 (4th Cir. 1991) 19

United States v. Eichman, 496 U.S. ___, 110 L.Ed.2d 287, 110 S.Ct. 2404 (1990)..... 18

United States v. Lemon, 723 F.2d 922 (D.C. Cir. 1983) .18, 24

United States v. Robel, 389 U.S. 258 (1967) 21

Yates v. United States, 354 U.S. 298 (1957)..... 21

Zant v. Stevens, 462 U.S. 862 (1983) ...13, 14, 16, 17, 26

UNITED STATES CONSTITUTION

First Amendment..... *passim*

Eighth Amendment..... 2

Fourteenth Amendment.....2, 18

STATUTES AND RULES

28 U.S.C. § 1257(a) 1

Del. C. Ann., Title 11, § 636..... 2

Del. C. Ann., Title 11, § 4209..... 2, 4, 5

TABLE OF AUTHORITIES – Continued

Page

United States Supreme Court Rule 20 1

Delaware Rule of Evidence 403 9

OTHER AUTHORITY

Oliver Wendell Holmes, *The Common Law*, 110 (1881) 19

OPINION BELOW

The opinion of the Delaware Supreme Court at issue was filed on October 4, 1990, and is cited as *Dawson v. State,* 581 A.2d 1078 (Del. 1990). It appears in the joint appendix at A.135-209.

STATEMENT OF JURISDICTION

A petition for a writ of *certiorari* to review the October 4, 1990 judgment of the Supreme Court of Delaware which affirmed the petitioner's conviction and sentence of death, was filed on January 2, 1991.

The petition for writ of *certiorari* to the Supreme Court of Delaware was granted by the Court on April 1, 1991.

The Court's jurisdiction to review this matter is predicated upon 28 U.S.C. § 1257(a) and Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Eighth Amendment to the Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in pertinent part:

> . . . nor shall any state deprive any person of life, liberty, or property without due process of law.

Two Delaware statutes provide the background for the penalty hearing that gave rise to the issue presented in this case. The first is *Del. C. Ann.*, Title 11, § 636, which defines the offense of Murder in the First Degree. The second is *Del. C. Ann.*, Title 11, § 4209, which prescribes the punishment, the procedure for determining punishment and the method of punishment for the offense of Murder in the First Degree. That statute provides in pertinent part that:

(b)(1) Upon a conviction of guilt of a defendant of first-degree murder, the Superior Court shall conduct a separate hearing to determine whether the defendant should be sentenced to death or to life imprisonment without benefit or probation or parole as authorized by subsection (a) of this section. If the defendant was convicted of first-degree murder by a jury, this hearing shall be conducted by trial judge before that jury as soon as practicable after the return of the verdict of guilty. . . .

(c)(1) . . . At the hearing, evidence may be presented as to any matter that the Court deems relevant and admissible to

the penalty to be imposed. The evidence shall include matters relating to any mitigating circumstance and to any aggravating circumstance, including, but not limited to, those aggravating circumstances enumerated in subsection (e) of this subsection. . . .

(c)(4) In the instructions to the jury the Court shall include instructions for it to weigh and consider any mitigating circumstances or aggravating circumstances and any of the statutory aggravating circumstances set forth in subsection (e) of this section which may be raised by the evidence. The jury shall be instructed to weigh any mitigating factors against the aggravating factors.

(d)(1) A sentence of death shall not be imposed unless the jury or judge, where appropriate, finds:

a. Beyond a reasonable doubt at least 1 statutory aggravating circumstance; and

b. Unanimously recommends, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that a sentence of death be imposed. . . . A finding by the jury of a statutory aggravating circumstance, and a consequent recommendation of death, supported by the evidence, shall be binding on the Court. . . .

(d)(3) If the jury, or judge when applicable, cannot unanimously find that at least 1

statutory aggravating circumstance exists and cannot unanimously recommend death, the Court shall sentence the defendant to life imprisonment without benefit of probation or parole.

STATEMENT OF THE CASE

On the morning of December 1, 1986, the petitioner, David Dawson, and three other prisoners escaped from the state correctional facility near Clayton, Delaware. (J.A.137) Later that afternoon, Madeline Kisner was found dead at her rural home near Clayton, Delaware, murdered during a burglary. (J.A.140-141) The petitioner was later arrested and charged with robbery, burglary, murder and weapons offenses as a result of the Kisner murder. Following a jury trial, Dawson was convicted on all counts related to the burglary and murder. (J.A.135)

Following these findings of guilt, the trial court conducted a penalty hearing pursuant to *Del. C. Ann.*, Title 11, § 4209. (J.A.135) The jury unanimously recommended the death sentence.[1] (J.A.135) As a consequence of this legally binding recommendation, *Del. C. Ann.*, Title 11, § 4209(d), Dawson was sentenced to death by lethal injection. To establish petitioner's eligibility for the death penalty, the State alleged and the jury found three statutory aggravating circumstances to have been established

[1] Four death sentences were actually imposed for a single murder because the defendant was indicted on and convicted of four counts of murder, each embodying a different statutory basis.

by the evidence introduced at the guilt phase of trial: 1) The murder was committed by an escapee from a place of confinement; 2) The murder was committed during the commission of a burglary or robbery; and, 3) The murder was committed for pecuniary gain.[2] *Dawson v. State*, 581 A.2d 1078, 1102 n.27 (Del. 1990). (J.A.189)

To persuade the sentencing jury to impose a sentence of death, the State of Delaware also relied on several non-statutory aggravating circumstances, three of which are relevant in this appeal: As noted by the trial judge in his post-trial report, these were that:

> 1. "D[awson] has associated himself with the Aryan Brotherhood, a white racist prison gang."
>
> 2. "D[awson] has taken the name "Abbaddon", which may be defined as the destroyer or angel of the bottomless pit or the like."
>
> 3. "D[awson] described himself as one of the Satan's disciples on the evening of the murder."[3]

Prior to trial the defense had objected to the introduction of any evidence concerning the defendant's alleged belief in or affiliation with the Aryan Brotherhood during the trial or penalty phase on the ground that Dawson's First Amendment rights of freedom of belief,

[2] Delaware law requires a finding of at least one aggravating circumstance as a condition precedent to a jury's recommendation of death. *Del. C. Ann.*, Title 11, § 4209(e)(1).

[3] ¶10 of Trial Judge's Report dated July 26, 1988. The State also cited as nonstatutory aggravating circumstances the allegation that the victim was defenseless, Dawson's adult and juvenile record, Dawson's extensive periods of incarceration and Dawson's correctional record. (R.2)

freedom of association, freedom of religion, and due process rights would be violated if the State were allowed to introduce such evidence. (J.A.2-3, 8-25) The defense had filed a motion *in limine* concerning this issue which was later argued on several occasions prior to trial and also prior to the commencement of the penalty hearing. (J.A.2-3, 8-25, 147-149, 183-184)

The prosecution took the position that evidence of Dawson's affiliation with the Aryan Brotherhood was admissible during Dawson's penalty hearing:

> If he advocates racial and religious bigotry and supports those himself, I think that definitely reflects on his character and his propensities and that is one of the things that is relevant to the jury. So it may or may not be relevant at the guilt phase depending on how the trial comes up, but it is very definitely relevant in the penalty phase.
>
> * * *
>
> I think the fact he may subscribe to very radical beliefs about blacks and Jews[4] is far more relevant to his character and propensities than a misdemeanor theft charge 10 years ago. . . .

(J.A.11, 17).

[4] Although the defendant's alleged racial prejudice was an issue at Dawson's trial, (A.14-17), the trial judge indicated that Dawson did not raise race as an issue at trial nor did race otherwise appear as an issue at trial in his capital sentencing report to the Delaware Supreme Court dated July 26, 1988. (A.133)

When asked by the trial court how the Aryan Brotherhood could be tied into the petitioner, the prosecution responded in part:

> Well, Your Honor, as I said, it wouldn't be tied in a specific sense. The State can't produce an expert who can tell us that David Dawson holds this particular belief or David Dawson acts upon this particular belief. What we seek to introduce is some understanding of what David Dawson ascribes to himself, the label Aryan Brotherhood . . .

(J.A.34-35). The prosecution later expanded on this point:

> In other words, we are looking at the character of this man, David Dawson, and not only things that he does. . . . What is important is for the jury to understand this is what he is into. This is his character. His character is he thinks the Aryan Brotherhood is a really neat organization and he believes in the things that they believe in. He wears their tattoo. He wears their belt. He carries their literature, he paints his wall and so forth.

(J.A.37-38). According to the state prosecutors, some literature seized from the petitioner's prison cell "deals with kinds of white supremacy as religion." (J.A.36)

At the conclusion of the foregoing proffer by the prosecution, the trial court asked defense counsel: "Doesn't the joining of the Aryan Brotherhood provide at least some clue as to the character of the individual who would do that?" to which defense counsel responded:

> Yes. It provides some clue as to his character, but our position is that when it shows his character by indicating what his beliefs are, he would not be punished for his beliefs. If the jury

> is to impose a death penalty, they should base it on the crimes for which he has been convicted today, his crimes in the past, actions that he has done or failed to do. . . . *What one individual thinks in his or her mind should not be a ground used to find a fact to give to condem* [sic] *that person to death.*

(emphasis added). (J.A.41)

The State proffered no evidence that petitioner did anything unlawful in conjunction with his belief in the Aryan Brotherhood. The prosecutor asserted that petitioner's ideology alone without any associated illegal conduct was material to the issue of whether petitioner should be put to death:

> THE COURT: Other than perhaps painting his wall, has Mr. Dawson, in conjunction with his Aryan Brotherhood membership as it is purported to be, done anything unlawful while in prison?
>
> PROSECUTOR: Well, he may have, Your Honor. Nothing that we have caught him at.
>
> THE COURT: Anything that the State could offer?
>
> PROSECUTOR: No, Your Honor. . . . We don't think it is important that whether he acted or not acted on his membership in this group – what we think is important is that is the kind of thing he ascribes to. That is his character. He thinks that the Aryan Brotherhood is an organization that he wishes to align himself with.

(J.A.48-49)

The trial judge "ultimately concluded that the State could introduce evidence about the Aryan Brotherhood during the penalty phase of Dawson's trial." *Dawson v. State*, 581 A.2d at 1088 n.8. (J.A.152) In doing so, the trial court rejected the petitioner's contention that the First Amendment precluded the admission of evidence of his belief in the Aryan Brotherhood and ruled that the admissibility of such evidence would be determined during the penalty hearing at the time of its proffer by, "judg[ing] its probative value and any defense balancing as necessary under Rule 403 in the context of what proceedings are at the time in which the evidence is offered." (J.A.25)

Prior to the commencement of the penalty hearing, the parties stipulated that:

> The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.

(J.A.132) In exchange, the State agreed not to call an expert witness to explain the nature and origin of the organization. (J.A.184)

The only evidence presented to the jury concerning Dawson's affiliation with the Aryan Brotherhood was a photograph of his hand bearing a tattoo showing the name Aryan Brotherhood and a one percent symbol in its center. (J.A.82-83) The prosecution introduced no evidence of either the nature of Dawson's affiliation with the Aryan Brotherhood or conduct which is ascribed to Dawson's affiliation with the Aryan Brotherhood.

Despite the absence of any evidence of misconduct by Dawson which could be ascribed to his affiliation with

the Aryan Brotherhood or any acts of misconduct by the Aryan Brotherhood in the Delaware Correctional Center [or anywhere else], the State emphasized the petitioner's belief in the Aryan Brotherhood as an aggravating factor supporting the death penalty. In his opening statement to the jury at the commencement of Dawson's penalty hearing, the prosecutor commented:

> You will hear evidence that the defendant is a member of the Aryan Brotherhood and the stipulation will include the fact that the Aryan Brotherhood is a racist, a white racist prison gang and, finally, you will hear evidence as to the defendant's own proclamation of his nickname Abaddon and we will find out in a few minutes what Abaddon means. Now, aside from those nonstatutory aggravating circumstances, that is the State's case.

(J.A.62) The prosecution again emphasized petitioner's affiliation with the Aryan Brotherhood in its summation at the conclusion of the penalty hearing:

> The character and propensities of the defendant. We introduced evidence to you ladies and gentlemen, about other things which go directly to his character and propensities. The Aryan Brotherhood is a white racist prison gang. What does that tell you about David Dawson? It is not just a casual association. He has branded himself with his tattoo Aryan Brotherhood.
>
> Could have joined the JC's in prison. Could have gotten his GED. Could have done something good. What does he become? An Aryan brother. What does that say about his character and propensities?
>
> . . . .

> Those are the nonstatutory aggravating circumstances, ladies and gentlemen. Those are other reasons why – those are the character, they reflect the character, the propensities of David Francis Dawson. They tell you what type of person he is.
>
> They also call out for the death penalty and what is the response to that?
>
> . . . .
>
> . . . Where is going to AA compare with proclaiming yourself an Aryan Brother? Where does abstinence of alcohol, where does temperance range in his list of priorities compared to associating himself with a racist gang?
>
> What does that tell you about the significance of those mitigating circumstances?. . . .
>
> Where does the love of [a] half sister who sees him two or three times a month weigh against the real David Dawson who 7 days a week, 35 [sic] weeks a year is Aryan Brother David Dawson, is Abaddon?

(J.A.105-107) The prosecutor returned once more to this subject in rebuttal summation at the end of the penalty hearing:

> Second of all, what evidence is there that the defendant is going to think about anything except another tattoo? None. And he accuses the State of having introduced inflammatory terms in this case: The Aryan Brotherhood and Abbaddon. And he says well, if he has these thoughts, what's the harm?
>
> . . . If he wants to join the Aryan Brotherhood, fine. If he wants to join the JC's fine. . . .
>
> . . . .

> One of the cornerstones of American life is the freedom to make those choices. One of the corner stones of the American life is the responsibility for the choices you make. David Dawson was not forced to make the choices he made. . . . He wasn't forced to join the Aryan Brotherhood. He chose to do so.

(J.A.125, 129)[5]

Upon appeal, the Delaware Supreme Court affirmed Dawson's death penalty sentence, ruling that the evidence of Dawson's membership in the Aryan Brotherhood "was relevant to Dawson's character. Its admission did not violate Dawson's constitutional rights." *Dawson v. State*, 581 A.2d at 1103-1104. (J.A.192)

In finding no violation of Dawson's First Amendment rights, the Delaware Supreme Court neither analyzed nor discussed applicable First Amendment principles declared by this Court. Instead, the Delaware Supreme Court found that because the evidence of Dawson's membership in the Aryan Brotherhood "properly focused the jury's attention on Dawson's character . . . and did not shift the jury's attention away from

---

[5] In addition, over the defendant's objection, the State was permitted to offer evidence that a tattoo containing the term "Abaddon" was located across petitioner's stomach area and that Webster's dictionary defines "Abaddon" as "one of Satan's disciples" or the "angel of the bottomless pit." (A.84-86, 183) The State also presented evidence that the petitioner introduced himself to someone he had met on the evening following the homicide as "Abaddon" and said that the name meant "one of Satan's disciples." (A.80-81)

the issue of Dawson's character," such evidence was admissible. *Id.* at 1103. (J.A.191-192)

SUMMARY OF THE ARGUMENT

The prosecutors asserted the petitioner's affiliation with a white racist prison organization as an aggravating circumstance in order to persuade the jury to return a death sentence. The trial court and the Delaware Supreme Court approved of this on the basis that Dawson's mere affiliation with the white racist ideology of the Aryan Brotherhood constituted admissible character evidence in a capital sentencing proceeding which could support imposition of a death sentence for the petitioner. However, because Delaware "attached the 'aggravating' label to factors that are constitutionally impermissible," due process requires that the petitioner's death sentence be vacated. *Zant v. Stephens*, 462 U.S. 862, 885 (1983).

The only connection between the petitioner and the Aryan Brotherhood was manifested by a tattoo on his hand. Therefore, the petitioner's expressive behavior by wearing the group's tattoo constitutes the purest form of constitutionally protected activity, namely the mere affiliation with a group defined by its belief in a distasteful ideology.

Because both the petitioner and his murder victim were white, Dawson's interest in the Aryan Brotherhood was totally irrelevant to the question of whether or not he should be sentenced to death for the murder. *Barclay v. Florida*, 463 U.S. 939 (1983). Therefore, the prosecution's introduction of the issue at petitioner's penalty hearing

caused a constitutionally impermissible factor to intrude into the jury's capital sentencing decision.

The constitutional invalidity of the petitioner's death sentence is additionally confirmed by the absence of any legislative judgment articulating a principle by which such associational activity is to be evaluated as evidence of evil character deserving a sentence of death.

The due process clause of the Fourteenth Amendment forbids the execution of a defendant such as Dawson whose sentence of death was returned by the jury after the prosecution argued that the defendant's white racist beliefs provided a basis for imposing the sentence of death for a non-racially motivated murder. *Zant*, 462 U.S. at 885.

ARGUMENT

DAWSON'S SENTENCE OF DEATH IS INVALID BECAUSE THE STATE OF DELAWARE ASSERTED HIS CONSTITUTIONALLY PROTECTED BELIEFS AS AN AGGRAVATING CIRCUMSTANCE SUPPORTING THE SENTENCE OF DEATH.

This case presents a very narrow issue. Over Dawson's federal constitutional objections, the prosecutor at the penalty phase of his capital murder trial was permitted to present to the sentencing jury, as a reason for imposing a death sentence, evidence that "Dawson identified himself as a member of the prison gang known as the Aryan Brotherhood by having its name and logo tattooed on his body." *Dawson v. State*, 581 A.2d 1078,

1102 (1990). (J.A.188) The only information that the prosecutor offered concerning the Aryan Brotherhood was that it was a "white racist prison gang" originating in California in the 1960's which had given rise to like-named organizations "in many state prisons including Delaware." (J.A.132)

The prosecutor did not undertake to show that the Aryan Brotherhood, or whatever group went by that name in any Delaware prison, had committed any unlawful acts. He did not undertake to show that the Aryan Brotherhood had committed any acts at all, other than entertaining "white racist" beliefs and spreading from prison to prison. He did not show – and could not show, because it is not the case – that any Delaware prison authorities had forbidden inmates to belong to the Aryan Brotherhood. He did not show, and he explicitly disavowed the possession of any evidence which showed, that Dawson himself had ever engaged in any overt behavior (other than having himself tattooed and painting his cell wall) which supported whatever the Aryan Brotherhood was or did, (J.A.48-49), or which even revealed "that David Dawson holds this particular belief or David Dawson acts upon this particular belief." (J.A.34, 35)

The Delaware General Assembly has not specified that membership in the Aryan Brotherhood or any class of organizations including the Aryan Brotherhood was an aggravating circumstance in a murder case. The prosecutor neither showed nor suggested that Dawson's affiliation with the Aryan Brotherhood was connected in any was with the murder of Madeline Kisner. Both the petitioner and the murder victim were white. Rather, the

admission of the Aryan Brotherhood evidence in aggravation was based solely on the theory, as expressed by the trial judge and quoted by the Delaware Supreme Court, that "membership or the act of joining an organization of any particular kind, whether it be the Aryan Brotherhood or the Boy Scouts of America can be probative of character, at least to some extent." *Dawson v. State*, 581 A.2d at 1100. (J.A.184)

Thus, the issue presented is whether the purest form of constitutionally protected associational activity – mere affiliation with a group defined by its belief in a distasteful ideology – can be used to support a death sentence for a murder to which it is wholly unrelated, in the absence of any legislative judgment articulating and limiting the principle by which such belief or associational activity is to be evaluated as evidence of evil character deserving a sentence of death.

The prosecutor's use of Dawson's affiliation with the Aryan Brotherhood as an aggravating circumstance in justification of the imposition of a death sentence penalized his exercise of constitutionally guaranteed rights to free belief and free association. Because the prosecutor was permitted to present evidence of Dawson's affiliation with the Aryan Brotherhood on the theory that his mere agreement with the organization's racist ideology was a reason for sentencing him to death, a constitutionally impermissible factor intruded into the capital sentencing decision in his case. *Zant v. Stephens*, 462 U.S. at 885 (1983).

Thus, in its Brief in Opposition, Delaware concedes that it could not have made "the possession of a particular belief or the exercise of other constitutionally

protected self-expressive activity a 'threshold' statutory aggravating circumstance." Br. In Opp., p. 24. Nonetheless, Delaware argues that no error has occurred because Dawson's affiliation became a factor only in the final and highly discretionary stage of the sentencing process when the decision of Dawson's jury to impose the death sentence could be influenced by his white racist beliefs: "[T]he traditional First Amendment constraints against governmental viewpoint discrimination are not applicable when a capital sentencing jury is called upon to make the 'reasoned moral response' whether 'an individual has lost his moral entitlement to live'." Br. In Opp. pp. 27-28.

Delaware, however, can offer no reasonable explanation for the unprecedented distinction it relies upon. Indeed, in *Zant*, it was only because Georgia had not attached the "aggravating" label to constitutionally protected belief or association, that evidence establishing the invalid statutory aggravating circumstance was found to be admissible at the penalty hearing, although the circumstance itself could not have served as a sufficiently valid statutory "channeling" factor to properly narrow the class of persons eligible for the sentence of death. *Id.* at 885.

Moreover, as this Court has recently observed:

> If there is a bedrock principle underlying the First Amendment it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

Texas v. Johnson, 491 U.S. 397, 414 (1989). That others are "profoundly opposed . . . is no proper basis for restricting speech or expression under the First Amendment." *Id.* at

432 (Rehnquist, C.J., dissenting). See also, *United States v. Eichman*, 496 U.S. ___, ___, 110 L.Ed.2d 287, 297, 110 S.Ct. 2404, 2410 (1990) (Stevens, J. dissenting). Among the rights also secured by the First and Fourteenth Amendments is the right to freedom of association. *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). The right to freedom of association includes the right to affiliate with whatever group(s) one chooses without fear of criminal repercussion. *Healy v. James*, 408 U.S. 169, 185-86 (1972); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *DeJonge v. Oregon*, 299 U.S. 353 (1937). It "includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it." *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). Also within the rights secured by the First and Fourteenth Amendments is the right to freedom of thought which "extend[s] to all irrespective of their race or ideology." *Id.* at 482-83. This right to freedom of thought includes the right to choose one's own ideology free from any threat of criminal sanction. *Brandenburg v. Ohio*, 395 U.S. at 456 (Douglas, J., concurring) ("One's beliefs have long been thought to be sanctuaries which the government could not invade."). In *Brandenburg*, this Court held that the First Amendment removes from the sphere of criminal prosecution the remarks of a white racist leader of a Ku Klux Klan group who speaks at a cross-burning and utters phrases such as "Bury the niggers," "the niggers should be returned to Africa," and "send the Jews back to Israel." *Id.* at 446.

A sentence based to any degree on beliefs protected by the First Amendment is constitutionally invalid. *United States v. Lemon*, 723 F.2d 922 (D.C. Cir. 1983)

(defendant a member of the "Black Hebrews"). Another court has also recently observed:

> Sentencing discretion, however, must be exercised within the boundaries of due process . . . Courts have held that sentences imposed on the basis of impermissible considerations, such as a defendant's race or national origin, violate due process . . . While these cases focused on a defendant's characteristics, we believe that similar principles apply when a judge impermissibly takes on his own religious characteristics into account in sentencing. (citations omitted).

United States v. Bakker, 925 F.2d 728, 740 (4th Cir. 1991).

The prosecution below insisted that it was the petitioner's acceptance of the ideology of the Aryan Brotherhood without any associated illegal conduct which was material to the issue of whether Dawson should be put to death. (J.A.48-49)[6] Under the prosecution's view, Dawson's affiliation showed his character because "his character is he thinks the Aryan Brotherhood is a really neat organization and he believes in the things that they believe in." (J.A.38)[7]

---

[6] However, our system of justice has never recognized this Orwellian concept of "thoughtcrime." Rather, "A man may have as bad a heart as he chooses, if his conduct is within the rules." Oliver Wendell Holmes, *The Common Law*, 110 (1881).

[7] The prosecution could not attribute any illegal conduct to the Delaware Aryan Brotherhood which the prosecution stipulated was a distinct and separate group from the prison gang bearing the same name. (J.A.46)

The claim by Delaware's prosecutors that evidence of Dawson's affiliation with the Delaware Aryan Brotherhood was relevant to justify his death is also unsupported by any findings about the Delaware Aryan Brotherhood by state prison administrators who evidently found it unnecessary to regulate any facet of an inmate's affiliation with the Aryan Brotherhood. Moreover, there has never been any contention that Dawson's affiliation with the Delaware Aryan Brotherhood was illegal or contrary to any rule or regulation of Delaware's prison system, other than perhaps painting his wall with ideological symbols. Accordingly, Dawson's incarceration itself entailed no applicable limitation upon his rights to affiliate himself with the Aryan Brotherhood and to embrace its white racist ideology. *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *Procunier v. Martinez*, 416 U.S. 396 (1974). In *Jones*, prison officials distinguished between union membership, which was permitted, and union activities, seeking only to regulate that union activity which they reasonably believed would interfere with the orderly administration of the prison system.

Even if any activities incident to affiliation with the Aryan Brotherhood had been prohibited under prison regulations, the prosecution's attempt to impute its illegal goals to Dawson was constitutionally invalid. This Court has taken the occasion to caution lower courts that: "A number of complex motivations may impel an individual to align himself with a particular organization. (citation omitted). It is for that reason that the mere presence of an individual's name on an organization's membership rolls is insufficient to impute to him the organization's illegal

goals." *United States v. Robel*, 389 U.S. 258, 266 n.16 (1967). Even when an organization is shown to embrace illegal as well as legal aims – as was not shown of the Aryan Brotherhood here – an individual cannot constitutionally be penalized for membership without proof that he or she was aware of the illegal aims and intended to promote them. See, e.g., *Yates v. United States*, 354 U.S. 298, 331 (1957).

> [T]his element of [a] . . . membership crime . . . must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other unprotected purposes which he does not necessarily share.
>
> *Noto v. United States*, 367 U.S. 290, 299-300 (1961).

The Delaware Supreme Court ignored these basic precepts when if found: "Dawson's affiliation with this type of organization was not only indicative of how he identified himself and how he wanted to be identified by others, but again was characteristic of his lawless nature and rejection of rehabilitation during his incarceration." *Dawson*, 581 A.2d at 1102. (J.A.188) The finding that Dawson's affiliation with the Delaware Aryan Brotherhood was "characteristic of his lawless nature and rejection of rehabilitation during his incarceration," (J.A.188), is not only legally incorrect but has no basis in fact. The entirety of the evidence offered to establish the nature and extent of Dawson's affiliation with the Aryan Brotherhood was

that he wore an alleged Aryan Brotherhood tattoo and the stipulation that:

> The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.

(J.A.132)

It is fundamental that before any criminal sanction may lawfully be imposed for one's affiliation or association with an organization, the government must discharge: "[its] burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." *Healy v. James*, 408 U.S. at 186; *Scales v. United States*, 367 U.S. 203 (1961); *Noto v. United States*, 367 U.S. 290 (1961). There was certainly no such showing in Dawson's case.

By justifying the jury's consideration of evidence of Dawson's membership in the Aryan Brotherhood as evidence of character which was relevant to the jury's determination of whether he should be executed, the prosecution and the Delaware Supreme Court ignored this Court's command that a state cannot avoid respecting the exercise of First Amendment rights "by mere labels." *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 6 (1964); *N.A.A.C.P. v. Button*, 372 U.S. 415, 429 (1963).[8]

---

[8] Even where evidence of a defendant's constitutionally protected affiliation is introduced, not to punish him but for an

(Continued on following page)

The only constitutionally legitimate basis for utilizing Dawson's white racist beliefs and affiliation with the Aryan Brotherhood would have been if the murder was racially motivated as a result of these beliefs. *Barclay v. Florida*, 463 U.S. 939 (1983). However, both Dawson and Kisner were white and the State has conceded that the murder was not racially motivated. Therefore, the prosecution should not have been permitted to assert Dawson's white racist beliefs as supporting a sentence of death under the guise that his ideology constituted admissible character evidence.

Our beliefs may shed light on our character in all sorts of ways whether we believe in Allah or the Pope, the NAACP or the KKK, an organized religion or atheism, the Black Hebrews or the Aryan Brotherhood. However, our constitution protects us from being punished by the government for our beliefs regardless of what those beliefs may indicate about our character. Under our constitutional scheme, the exercise of governmental power is subject to certain basic rights enjoyed by citizens – no matter how offensive the majority might find the beliefs protected by the existence of such rights to be.

If this Court were to sanction the use of political beliefs and associations as aggravating factors supporting the imposition of the death penalty, what limiting principle, if any, could be devised to ensure its even-handed

---

(Continued from previous page)

otherwise recognized and proper limited purpose, any irrelevant reference to the defendant's ideological belief or affiliation should be sanitized in the evidence presented to the jury. *United States v. Abel*, 469 U.S. 45, 48 (1984).

application? Who would decide which First Amendment beliefs or associations would be protected and which would be grist for the death sentencing mill?

If Delaware officials were to decide this, by what standards would they balance countervailing First Amendment protected values against each other? Were Delaware race neutral in its death policy, would it not also insist that membership in the "Black Hebrews", "Black Muslims", "Mexican Mafia" or other prison ethnic or racial sects would similarly constitute "character" evidence probative in a death penalty proceeding of whether that individual should die? Cf. *United States v. Lemon*, 723 F.2d 922 (D.C. Cir. 1983). Would Delaware likewise contend that anyone who voted for, worked for or merely sympathized with either State Representative David Duke of Louisiana or Reverend Louis Farrakhan is more deserving of the death penalty than he or she would otherwise have been? Where in such line-drawing would Delaware place any person who had voted for, worked for or merely believed in George Wallace's presidential candidacy? What of a Muslim who hoped for, prayed for, or lobbied for a triumph by Saddam Hussein in the recent Persian Gulf War? What of a person who had burned an American flag in political protest? *Texas v. Johnson*, 491 U.S. 397 (1989). Where would former officials whose reluctance to enforce racial integration denied black students equal protection of the law stand?[9]

---

[9] Delaware's present avoidance of race neutrality may be viewed in an ironic historical context. Nearly forty years ago,

(Continued on following page)

Dawson's affiliation with the Aryan Brotherhood was an exercise of his right to freedom of belief and association and not a legitimate reason to tilt the balance of the jury's discretion towards a sentence of death. His racist views – certainly unpalatable to the majority of this country's citizens – are nothing more and nothing less than a manifestation of his right to believe as he chooses without governmental intrusion: "The result we have reached is dictated by the fundamental proposition that if [First Amendment] rights are to remain vital for all, they must protect, not only those whom society deems acceptable, but also those whose ideas it quite justifiably rejects and despises." *Collin v. Smith*, 578 F.2d 1197, 1210 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). If the government cannot fine or imprison the petitioner as a result of such belief, or deny him employment or a passport as a result of such belief, then the government can no more remove him from the census roles and seek his death as a result of his holding such beliefs. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

Dawson's death sentence is constitutionally infirm because the jury was permitted at the sentencing stage "to draw adverse inferences from conduct that is constitutionally protected." *Zant*, 462 U.S. at 885. Because Delaware has "attached the 'aggravating' label to factors that

---

(Continued from previous page)

Delaware asked for relief in this Court from an order of its own Supreme Court ordering desegregation on equal protection grounds in several racially segregated "separate but equal" unequal school districts. *Gebhart v. Belton*, 91 A.2d 137 (Del. 1952), modified *sub. nom., Brown v. Board of Education*, 347 U.S. 483 (1954).

are constitutionally impermissible", due process requires that Dawson's sentence of death be vacated. *Id.* See also *Baldwin v. Alabama*, 472 U.S. 372, 382 (1985).

CONCLUSION

Based upon the foregoing argument and authorities, the Petitioner's sentences of death should be vacated.

Respectfully submitted,

LAWRENCE M. SULLIVAN
Public Defender of the
State of Delaware

BERNARD J. O'DONNELL
Assistant Public Defender
(Counsel of Record)

BRIAN J. BARTLEY
Assistant Public Defender

Office of Public Defender
820 North French Street
Wilmington, Delaware 19801

Attorneys for Petitioner

(8)

No. 90-6704

Supreme Court, U.S.
FILED
JUL 26 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

DAVID F. DAWSON,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Delaware

BRIEF FOR RESPONDENT

CHARLES M. OBERLY, III
Attorney General of the
State of Delaware

RICHARD E. FAIRBANKS, JR.
Chief of Appeals Division

GARY A. MYERS
Deputy Attorney General
Counsel of Record

LOREN C. MEYERS
Deputy Attorney General

Delaware Department of Justice
1 South Race Street
P.O. Box 508
Georgetown, DE 19947
(302) 856-5353

July 26, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402)-342-2831

BEST AVAILABLE COPY

48 pp

COUNTER-QUESTION PRESENTED

Delaware uses a "Georgia" or "*Gregg*" type of procedure for determining who shall be sentenced to death after being convicted of first degree murder. Under such a scheme, did it contravene the federal Constitution, for the sentencing jury to consider, as a factor in deciding whether death is the appropriate penalty, prosecution evidence that the defendant belonged to a "white racist prison gang" calling itself the "Aryan Brotherhood?"

TABLE OF CONTENTS

	Page
COUNTER-QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
COUNTER-STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	16
ARGUMENT:	
NEITHER THE FIRST AMENDMENT NOR THE DUE PROCESS CLAUSE PREVENTS A SENTENCING JURY FROM CONSIDERING ALL EVIDENCE REFLECTING ON THE CAPITAL DEFENDANT'S CHARACTER, INCLUDING EVIDENCE THAT HE HAD EMBRACED A RACIST PRISON GANG	17
1. The Eighth Amendment Imposes Few Limitations On The Evidence A Capital Sentencing Jury May Consider	20
2. An Evaluation Of a Capital Defendant's "Character" Permits an Inquiry Into His Racist Beliefs And Involves The Exercise of Judgment by the Sentencing Jury	23
3. Racial Hatred and Capital Sentencing	34
4. The Aryan Brotherhood Evidence Was Relevant to the Sentencing Process	37
CONCLUSION	40

TABLE OF AUTHORITIES

	Page
CASES	
Barclay v. Florida, 463 U.S. 939 (1983)	27, 29, 30, 31, 32, 33
Black v. State, No. 69,648 (Tex. Crim. App. May 29, 1991) (1991 WL 87594)	28
Blystone v. Pennsylvania, 110 S.Ct. 1078 (1990)	25
Bob Jones University v. United States, 461 U.S. 574 (1983)	36
Booth v. Maryland, 482 U.S. 496 (1987)	33
Boyde v. California, 110 S.Ct. 1190 (1990)	27, 41
Brandenburg v. Ohio, 395 U.S. 444 (1969) (*per curiam*)	24
California v. Brown, 479 U.S. 538 (1987)	20, 35
California v. Ramos, 463 U.S. 992 (1983)	21
Clemons v. Mississippi, 110 S.Ct. 1441 (1990)	18
Commonwealth v. Abu-Jamal, 555 A.2d 846 (Pa. 1989), *cert. denied*, 111 S.Ct. 215 (1990)	15
Dawson v. State, 581 A.2d 1078 (Del. 1990)	2
Deputy v. State, 500 A.2d 581 (Del. 1985), *cert. denied*, 480 U.S. 940 (1987)	22, 27
DeShields v. State, 534 A.2d 630 (Del. 1987), *cert. denied*, 486 U.S. 1017 (1988)	23
Eddings v. Oklahoma, 455 U.S. 104 (1982)	21, 30

TABLE OF AUTHORITIES – Continued

Page

Evans v. McCotter, 790 F.2d 1232 (5th Cir.), *cert. denied*, 479 U.S. 922 (1986) 27

Flamer v. State, 490 A.2d 104 (Del. 1983 and 1984), *cert. denied*, 464 U.S. 865 (1983) and 474 U.S. 865 (1985) 8, 22

Franklin v. Lynaugh, 487 U.S. 164 (1988) .. 25, 27, 28, 37

Gregg v. Georgia, 428 U.S. 153 (1976) ..16, 21, 22, 24, 25

Holland v. Illinois, 110 S.Ct. 803 (1990) 40

Jones v. Butler, 827 F.2d 1006 (5th Cir. 1987), *cert. denied*, 486 U.S. 1046 (1988) 41

Lockett v. Ohio, 438 U.S. 586 (1978) 16, 21

Maher v. Roe, 432 U.S. 464 (1977) 37

McCleskey v. Kemp, 481 U.S. 279 (1987) 26

Mills v. Maryland, 486 U.S. 367 (1988) 28

Palmore v. Sidoti, 466 U.S. 429 (1984) 36

Payne v. Tennessee, 59 U.S.L.W. 4814 (U.S. June 27, 1991) (No. 90-5721) ..... *passim*

Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51 (1937) 38

People v. Belmontes, 755 P.2d 310 (Cal. 1988), *cert. denied*, 488 U.S. 1034 (1989) 27

Penry v. Lynaugh, 109 S.Ct. 2934 (1989) ... 20, 21, 26, 30

Rust v. Sullivan, 111 S.Ct. 1759 (1991) 37

Skipper v. South Carolina, 476 U.S. 1 (1986) 21

State v. Beuke, 526 N.E.2d 274 (Ohio 1988) 27

TABLE OF AUTHORITIES – Continued

Page

State v. White, 395 A.2d 1082 (Del. 1978) 22

United States v. Grayson, 438 U.S. 41 (1978) 38

United States v. Hendrix, 505 F.2d 1233 (2d Cir. 1974) 38

Walton v. Arizona, 110 S.Ct. 3047 (1990) 26

Whalen v. State, 492 A.2d 552 (Del. 1985) 8, 23

Whitney v. California, 274 U.S. 357 (1927) 24

Williams v. New York, 337 U.S. 241 (1949) 20

Witherspoon v. Illinois, 391 U.S. 510 (1968) 25

Woodson v. North Carolina, 428 U.S. 280 (1976) 36

Zant v. Stephens, 462 U.S. 862 (1983) 21, 24

CONSTITUTIONS, STATUTES, AND RULES

U.S. Constitution, amend. XIII 35

U.S. Constitution, amend. XIV 35

U.S. Constitution, amend. XV 35

Declaration of Independence (1776) 35

United Nations Charter art. 55(c) 36

Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) 36

Del. Code Ann. tit. 11, § 636(a)(1) (1987) 3

Del. Code Ann. tit. 11, § 636(a)(2) (1987) 3

Del. Code Ann. tit. 11, § 636(a)(6) (1987) 3

TABLE OF AUTHORITIES – Continued

Page

Del. Code Ann. tit. 11, § 636(a)(7) (1987) 3

Del. Code Ann. tit. 11, § 4209(c)(1) (1987) 22

Del. Code Ann. tit. 11, § 4209(d)(1)a (1987) 22

Del. Code Ann. tit. 11, § 4209(d)(1)b (1987) ... 9, 18, 22

Del. Code Ann. tit. 11, § 4209(e)(1) (1987) 22

Del. Code Ann. tit. 11, § 4209(e)(1)a (1987) 7

Del. Code Ann. tit. 11, § 4209(e)(1)j (1987) 7

Del. Code Ann. tit. 11, § 4209(e)(1)o (1987) 7

Del. Code Ann. tit. 11, § 4209(e)(2) (1987) 8

Del. Code Ann. tit. 11, § 4209(g)(2)a (1987) 15, 34

Supr. Ct. R. 14.1(a) 40

TREATISES AND ARTICLES

L. Tribe, *American Constitutional Law* (2nd ed. 1988) 33

Kaplan, *Evidence in Capital Cases*, 11 Fla. St. L. Rev. 369 (1983) 28

Weisberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305 .....26, 30

No. 90-6704

In The

Supreme Court of the United States

October Term, 1991

DAVID F. DAWSON,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Delaware

BRIEF FOR RESPONDENT

The State of Delaware, respondent, asks this Court to affirm the decision of the Supreme Court of Delaware upholding the verdict of the jury sentencing David Dawson to death for first degree murder

COUNTER-STATEMENT OF THE CASE

Petitioner, David Dawson, was found guilty of first degree murder, robbery, burglary, and multiple weapons offenses. He was sentenced to death for the murder and to an additional 100 years of imprisonment for the other

offenses. J.A. 135-36 (*Dawson v. State*, 581 A.2d 1078, 1081 (Del. 1990)).

1. The Murder

On December 1, 1986, Dawson was, as he had been almost all of his teenage and adult life, an inmate at a Delaware correctional institution. Early that morning, Dawson and three other inmates escaped from the Delaware Correctional Center near Smyrna in central Delaware.[1] Once outside, the four separated: the three other prisoners stole a car and proceeded north towards Wilmington while Dawson took another car and headed southward. Outside the small rural community of Kenton, Dawson broke into the home of Frank and Dorothy Seeney. Inside, he took a leather motorcycle jacket, several pocket watches, and various containers holding loose change. J.A. 138-40 (581 A.2d at 1082-83).

Dawson then turned his attention to the home of Richard and Madeline Kisner, a short distance away. There, he surprised Mrs. Kisner as she was preparing to go to work and brutally murdered her. When Mrs. Kisner's sixteen year old son returned home from school later that afternoon, he found his mother's body in her bedroom. She had been bound with shoelaces, stabbed in the chest twelve times, strangled with a stocking, and gagged with a sock. Missing was Mrs. Kisner's car as well

---

[1] Delaware correctional authorities had identified Dawson and the three other escapees (Richard Irwin, Mark McCoy, and Larry Nave) as members of a gang in the correctional facility calling themselves the Aryan Brotherhood. J.A. 39.

as several two dollar bills the slain woman had always kept in her wallet. J.A. 140-42 (581 A.2d at 1083-84).

Still fleeing southward, Dawson appeared later that evening in several bars around the town of Milford, wearing a motorcycle jacket and giving one woman in one bar one of the watches he had taken in the first burglary. Near one of the bars, the police found Mrs. Kisner's car. In it, Dawson had left not only his fingerprints but a postcard bearing his nickname. J.A. 142-43 (581 A.2d at 1084).

Later that night, the police finally apprehended Dawson. At the time, Dawson was still wearing the leather jacket stolen from the Seeney residence which now had fibers from Mrs. Kisner's housecoat. Inside the jacket pockets were four watches taken from the Seeney house and a two dollar bill. A sock, matching the one used to gag Mrs. Kisner, was in Dawson's pants pocket. J.A. 144-45 (581 A.2d at 1084-85).

2. The Trial

The grand jury charged Dawson with first degree murder, under four separate counts, and with eleven other crimes arising from his murderous spree during his escape.[2] Prior to trial, Dawson asked the trial court to bar

---

[2] One murder count alleged that Dawson had intentionally killed Mrs. Kisner; a second charged that he killed her during the course of a prison escape; and the two remaining murder counts charged him with killing her during the commission of the felonies of robbery and burglary. Del. Code Ann. tit. 11, § 636(a)(1), (a)(2), (a)(6), (a)(7) (1987).

the prosecution from introducing any evidence linking him with the prison gang called the Aryan Brotherhood, including any evidence that he bore tattoos of both the gang's name and swastikas. J.A. 2, 4-6. At that time, the trial court, with the prosecution's assent, conditionally excluded any evidence about the gang during the guilt-innocence phase of the trial. J.A. 5, 25 (trial court rulings); J.A. 21-22 (prosecution's agreement). However, because the trial court felt that such evidence might be admissible at any later penalty hearing, it agreed to question all the prospective jurors if "evidence relating to membership in an organization called the Aryan Brotherhood, a white supremacist group" would "affect [their] ability to serve as a fair and impartial juror in [the] case." E.g., Tr. A-56.[3]

At trial, the prosecution presented various witnesses to detail the events during the escape and to link Dawson to Mrs. Kisner's murder by forensic tests. J.A. 138-45 (581 A.2d at 1082-85). Dawson did not testify, but the defense presented three witnesses. The defense strategy was to admit that Dawson had been in the Kisners' house and had helped to subdue Mrs. Kisner, but to suggest that she had been killed by the other three escapees when he had gone outside. In apparent support of that theory, the defense introduced the clothing worn by Dawson when he was arrested, including a belt which "had two letters A and B separated by a swastika on the buckle." Def. Exh. 7 (Tr. J-49). *See also* J.A. 36 (description of belt). The jury

[3] Dawson challenged for cause, and the trial judge excluded, six prospective jurors on the basis of their answers to this inquiry. Tr. B-148-49, 170-71, 248-50; Tr. D-13-17, 57-58, 77-78.

returned guilty verdicts on all of the charges, including all four of the murder counts.

3. The Penalty Proceedings

After Dawson was convicted, the prosecutors represented that during the penalty hearing, they intended to introduce: 1) testimony, from an expert employed by the federal prison system, about the origin, nature, and central tenets of the Aryan Brotherhood; 2) photographs showing a tattoo on Dawson's hand bearing the words "Aryan Brotherhood" and showing tattoos on his back of swastikas; 3) a photograph of a large swastika painted by Dawson on the wall of his prison cell; and 4) articles found in Dawson's belongings bearing swastikas or insignia of the Aryan Brotherhood and written documents referring to white supremacy. J.A. 32-38. The prosecutors also indicated that Delaware police officers and correctional officials were available to testify about the nature of the Brotherhood at the Delaware prison where Dawson and his fellow escapees had been incarcerated. J.A. 39, 44. Dawson again objected, arguing that any such evidence was irrelevant and prejudicial. In addition, he asked the trial court to exclude any evidence indicating that he bore a large tattoo of the name "Abaddon" on his stomach or that he had ever used that name. J.A. 29, 54, 57. In response, the prosecutors acknowledged that they could not show that Dawson, while in prison, had committed any unlawful act in conjunction with his membership in the Aryan Brotherhood. J.A. 48. However, they argued that the proffered Brotherhood evidence was logically relevant to the issue of his "character," one of the issues

the Delaware death penalty statute required the sentencing jury to consider. The evidence would allow the jury to know what "he is into" and would show "the kind of thing he ascribes to." J.A. 38, 48-49. While conceding that the Brotherhood evidence would "provide[] some clue to his character," J.A. 41, Dawson argued that introduction of the evidence would allow the jury to punish him, contrary to the First Amendment, for his beliefs. J.A. 41, 51.

After hearing these arguments, the trial court ruled that Dawson's affiliation with the Aryan Brotherhood was logically relevant to the statutory issue of "character," finding that "membership or the act of joining an organization of any particular kind, whether it be the Aryan Brotherhood or the Boy Scouts of America[], can be probative of character, at least to some extent." J.A. 52. However, before the court could determine whether the proffered evidence, although relevant, would be unfairly prejudicial, the prosecution and defense reached an accord. J.A. 52, 56. Under the agreement, the prosecution could introduce the picture of Dawson's hand with the Aryan Brotherhood marking, and the jurors would be told:

> The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.

J.A. 56. In consideration, the prosecution would not present any witnesses to testify about the Brotherhood,

either locally or nationally. Dawson agreed that the stipulation rendered moot his motion in limine. J.A. 53.

Additionally, the defense successfully moved to bar introduction of any photographs of Dawson or his possessions showing swastikas, arguing that such exhibits could only be cumulative of the evidence of "white supremacy that is contained in the stipulation" and that, by the agreement, Dawson had already stipulated he was a "member of a white supremacist group." J.A. 55-57. Finally, the trial court ruled that the prosecution could also introduce a photograph showing the name "Abaddon" tattooed on Dawson's stomach as well as testimony that, while at one bar after the killing, he had referred to himself as "Abaddon," explaining that the name meant "one of Satan's disciples." In light of the defense concession that its only objection was to the photograph and the prosecution could instead present testimony that "he has a tattoo . . . or he used this identity," the trial court found the evidence relevant and not unfairly prejudicial. J.A. 54-55, 57-58.

When the penalty hearing began, the prosecution relied upon the existence of three statutory aggravating circumstances, two of which had been established by the jury's verdicts, to render Dawson *prima facie* eligible for the death penalty.[4] Consequently, when it presented its

---

[4] The three statutory aggravating circumstances were 1) the murder was committed by an escapee; 2) the murder was committed during the commission of a burglary or robbery; and 3) the murder was committed for pecuniary gain. Del. Code Ann. tit. 11, §§ 4209(e)(1)a, (e)(1)j, (e)(1)o (1987).

(Continued on following page)

evidence to the sentencing jury, the prosecution focused on what it billed as "non-statutory" aggravating circumstances, relating to Dawson's character. First, the prosecution offered records detailing Dawson's lengthy history of disregard for the law, including six juvenile commitments, fourteen adult convictions, six earlier escapes as both a juvenile and adult inmate, and 24 misconduct violations while incarcerated. J.A. 65-79. Secondly, consistent with the agreement reached with the defense, the prosecution introduced the picture of Dawson's right hand, showing the name "Aryan Brotherhood," and read to the jury the statement describing the Brotherhood as a "white racist prison gang." J.A. 82-84; State's Exhs. 86, 87 (Tr. M-100-02). The prosecution then introduced the Abaddon evidence, beginning with the photograph of the word tattooed on Dawson's stomach. J.A. 84-85; State's Exh. 88 (Tr. M-104). To explain the name to the jurors, a police officer, relying on a dictionary, testified that the term was a biblical one, meaning "angel of the bottomless pit." J.A. 86. Finally, Patty Dennis, one of the women who

---

(Continued from previous page)

Under the Delaware statute, the jury's earlier verdicts finding Dawson guilty of killing during the course of an escape and killing in the commission of a burglary and a robbery automatically established the first two of the above statutory aggravating circumstances. Del. Code. Ann. tit. 11, § 4209(e)(2) (1987); *Whalen v. State*, 492 A.2d 552, 560 n.5 (Del. 1985); *Flamer v. State*, 490 A.2d 104, 127 (Del. 1983 and 1984), *cert. denied*, 464 U.S. 865 (1983) and 474 U.S. 865 (1985). In its instructions to the jury at the end of the penalty hearing, the court told the jury to mark the special verdict interrogatory in accord with the statutory directive. Tr. N-79-80.

had been with Dawson in Milford after the killing, testified that Dawson had introduced himself to her as "Abaddon" and had told her that the name meant "one of Satan's disciples." J.A. 80-81.

Dawson did not testify at the penalty hearing, but the defense did present mitigating evidence. First, during cross-examination of the prison records clerk, defense counsel elicited testimony that Dawson, during his earlier years in prison, had earned various good time credits by enrolling in drug and alcohol treatment programs, attending group counselling, and working in prison industries. J.A. 79-80. Next, both Dawson's aunt and his half-sister told the jury that they still loved Dawson, despite his criminal activities, and that they visited him in prison and intended to continue to do so. J.A. 90, 92-93. Finally, the relatives recounted how Dawson had never known his father, and had, as a young child, been raised primarily by his aunt and his grandmother. According to them, his encounters with the law began when he was twelve years old and after his grandmother had died. J.A. 88-92. In addition, his aunt laid before the jury the story that once, when his dying young cousin needed a kidney transplant, Dawson, in a phone conversation, had offered to donate one of his kidneys. J.A. 89-90.

In their penalty hearing summation, the prosecutors focused on the statutory criteria of the "circumstances . . . of the offense" and the "character and propensities of the offender." Del. Code Ann. tit. 11, § 4209(d)(1)b (1987). When they turned to Dawson's character, the prosecutors wove Dawson's criminal record, his self-identification as Abaddon, and his embrace of the Aryan Brotherhood into a central theme that Dawson had

an incorrigible character with his entire life showing repeated decisions to reject any redeeming paths. Thus, after detailing the long history of Dawson's illegal conduct, one of the prosecutors told the jurors:

> . . . We introduced evidence to you, ladies and gentlemen about other things which go directly to his character and propensities. The Aryan Brotherhood is a white racist prison gang. What does that tell you about David Dawson? It is not just a casual association. He has branded himself with his tattoo Aryan Brotherhood.
>
> Could have joined the JC's [Jaycees] in prison. Could have gotten his GED. Could have done something good. What does he become? An Aryan Brother. What does that say about his character and propensities?

J.A. 105. Alluding to the Abaddon evidence, the prosecutor continued with the theme that Dawson simply was incorrigible:

> He has taken the name Abaddon. We didn't tell you that because necessarily, or even for any religious reason, but it tells you something about what Abaddon means: The ang[el] of the bottomless pit, one of Satan's disciples. What does that say about how he views himself, how he would like to be seen by other people? What purpose could there be in calling himself the angel of the bottomless pit, Abaddon, other than to tell people you better watch out for me. I am bad.
>
> This is not a passing fancy, a fad, a phase in his life. It is a direction his life has turned. It is just not a nickname he goes by. He has marred his body with that tattoo: Abaddon. He is serious about this, ladies and gentlemen. All the way across his stomach A B A D D O N in block letters that high. He relishes that connotation, that impression of evil: the ang[el] of the bottomless pit.

> Those are the non-statutory aggravating circumstances, ladies and gentlemen. Those are other reasons why – those are the character, they reflect the character, the propensities of David Francis Dawson. They tell you what type of person he is.

J.A. 105-06. Finally, the prosecutor compared these facets of Dawson's life to the evidence Dawson had advanced in mitigation:

> How do those meritorious good time credits stack up against the bad conduct, the felony conviction? Where is going to AA compare with proclaiming yourself an Aryan brother? Where does abstinence of alcohol, where does temperance range in his list of priorities compared to associating himself with a racist gang?
>
> What does that tell you about the significance of those mitigating circumstances? Where do the few picnics at the prison, how do they weigh against his repeated escapes and his weapon charges in jail?
>
> Where does the love of [a] half sister who sees him two or three times a month weigh against the real David Dawson who 7 days a week, 35 [sic] weeks a year is Aryan brother David Dawson, is Abaddon?

J.A. 106-07.

When he addressed the jury, defense counsel conceded that Dawson was an Aryan Brother and a white supremacist. J.A. 116. Yet, alluding to "freedom of speech" and "freedom of thought," he cautioned the jury that they should not give any weight to those facts, or

similarly to Dawson's use of the name Abaddon, because the prosecution had not shown any correlation between his membership in the gang or his use of the name Abaddon and any harm or any disruption caused in prison by Dawson. According to counsel, if the jurors gave effect to such evidence, they would be sentencing Dawson to death because of his beliefs. J.A. 115-17. Instead, the defense suggested that the evidence about Dawson's prison jobs and his involvement in prison programs showed that Dawson was "not just sitting in prison lying around doing nothing" but had made some "attempts to do certain things to at least improve his life." J.A. 121. Moreover, even if that evidence did not warrant the penalty of life imprisonment, instead of death, then, according to Dawson's attorney, the jurors should exercise mercy simply because there were people, such as Dawson's aunt and half-sister, who still cared for Dawson. J.A. 120-21.

In rebuttal, the prosecution again emphasized the purpose for its introduction of the Aryan Brotherhood and Abaddon evidence:

> And he accuses the State of having introduced inflammatory terms in this case: the Aryan Brotherhood and Abaddon. And he says well, if he has these thoughts, what's the harm?
>
> We are not required, ladies and gentlemen, to show there is another harm in the word Abaddon. It doesn't even make sense that there is. Obviously there isn't. If he wants to call himself Abaddon, fine. If he wants to join the Aryan Brotherhood, fine. If he wants to join the JC's [Jaycees], fine.

> You can bet if he joined the JC's you would hear about that in mitigation. You can bet if he joined the Kiwanis Club you would have heard about that in mitigation because it reflects upon the defendant's character. It tells us something about him.
>
> And what did Patty Dennis tell us about. It tells us something about the defendant that within 12 hours of this crime, of this brutal murder, he is describing himself to a complete stranger as one of Satan's disciples. It tells us something. Not that there is harm in it, but we are looking at the character of the defendant.

J.A. 125-26.

In its instructions, the trial court outlined the Delaware capital sentencing scheme, telling the jurors that they were required to consider all the aggravating circumstances and mitigating circumstances. According to the instruction, "[a]n aggravating circumstance [was] any factor relating to the crime or to the offender which tends to make the defendant's conduct more serious or the imposition of a penalty of death appropriate. . . ." J.A. 131. Conversely, the trial court said that "[a] mitigating factor [was] any factor relating to the crime or to the offender which tends to make the defendant's conduct less serious or the imposition of death inappropriate." *Id.* And it also told the jury that "[r]egardless of any of the circumstances," the jury had the absolute "discretion" to recommend a sentence of life imprisonment. *Id.* After deliberating for two hours, the jury returned its verdict, reporting that they found, beyond a reasonable doubt, the existence of all three statutory aggravating circumstances and that they unanimously recommended that Dawson be sentenced to death. The trial court, bound by law to

accept the recommendation, sentenced Dawson to die by lethal injection.

4. Appeal to the Delaware Supreme Court

Dawson appealed his conviction and sentence to the Delaware Supreme Court, advancing as two of his ten challenges, that the Aryan Brotherhood and Abaddon evidence should not have been admitted at the penalty hearing. Affirming the conviction and sentence, the Delaware Supreme Court rejected Dawson's contentions. The court found that under the state's capital punishment statute, the sentencing jury was allowed to consider a wide range of evidence, both in mitigation and aggravation, which might relate to "all the specific circumstances of the crime and the defendant." J.A. 186 (581 A.2d at 1101) (internal quotation omitted). The state court recognized that the main thrust of the prosecution's evidence at the penalty hearing was to show that Dawson's killing of Marie Kisner was consistent with the incorrigible nature of his character. J.A. 187 (581 A.2d at 1101). Under Delaware's sentencing procedure, the prosecution could offer the Aryan Brotherhood and Abaddon evidence to show that character. In the court's view, Dawson's selection and use of the name Abaddon "was relevant to his character because it was a reflection of how Dawson viewed himself and how he wanted to be viewed." J.A. 187-88 (581 A.2d at 1102). Furthermore, Dawson's decision to join a prison gang was relevant to the question of his character because his "affiliation with this type of organization was not only indicative of how he identified himself and how he wanted to be identified by others but

again was characteristic of his lawless nature and rejection of rehabilitation during his incarceration." J.A. 188 (581 A.2d at 1102).

Having found the evidence relevant, the court turned back Dawson's contention that the use of this evidence violated the First Amendment. Adopting the rationale of the Pennsylvania Supreme Court rejecting a similar challenge, the Delaware court ruled: " '[p]unishing a person for expressing his views or for associating with certain people is substantially different from allowing . . . evidence of [the defendant's] character [to be considered] where that character is a relevant inquiry.' " J.A. 190 (581 A.2d at 1103) (quoting *Commonwealth v. Abu-Jamal*, 555 A.2d 846, 859 (Pa. 1989), *cert. denied*, 111 S.Ct. 215 (1990)). Finding that the Aryan Brotherhood and Abaddon evidence had been presented in a manner "which did not shift the jury's attention away from the issue of Dawson's character," the court concluded that the admission of such evidence during the penalty hearing did not violate Dawson's rights. J.A. 191-92 (581 A.2d at 1103).

Finally, the state supreme court also reviewed Dawson's death sentence under the statutory requirement that it determine whether, "considering the totality of the circumstances of evidence in aggravation and mitigation which bears upon the particular circumstances or details of the offense and the character and propensities of the offender, the death penalty was either arbitrarily or capriciously imposed . . . or disproportionate to the penalty imposed in similar cases . . . . " Del. Code Ann. tit. 11, § 4209(g)(2)a (1987). The court concluded that "the weight

of the statutory and non-statutory aggravating circumstances completely overwhelmed the mitigating circumstances." J.A. 203 (581 A.2d at 1108). Because the record reflected the existence of "three statutory aggravating circumstances, significant non-statutory aggravating circumstances, and virtually no evidence of mitigation," J.A. 205 (581 A.2d at 1109), Dawson's death sentence was neither arbitrary nor disproportionate.

SUMMARY OF ARGUMENT

The federal Constitution does not mandate the creation of a prophylactic rule barring a capital sentencing jury from considering, at the final discretionary stage of the process, evidence that Dawson was a member of a white racist prison gang. Such evidence is reflective of character, the consideration of which is manifestly relevant in death penalty proceedings. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).

Delaware has chosen a "Georgia" or *"Gregg"*[5] procedure for determining when a convicted murderer should be sentenced to die. The universe of first degree murders is first narrowed by requiring the jury to find, beyond a reasonable doubt, the existence of at least one statutory aggravating circumstance. If that threshold is passed, the jurors look to "all relevant evidence in aggravation or mitigation" concerning the crime and the "character and propensities of the offender." Del. Code Ann. tit. 11, § 4209 (1987). Only if a statutory aggravating

[5] *Gregg v. Georgia*, 428 U.S. 153 (1976).

circumstance is found, may the jury then weigh the statutory and non-statutory aggravating factors against the mitigating factors and consider imposition of the death penalty. At that final discretionary stage, the jury decides both whether to attach a non-statutory aggravating or mitigating label to the evidence found, what weight to accord each factor, and whether to grant mercy. Dawson's membership in the Aryan Brotherhood, a white racist prison gang, was properly considered at this final stage. Indeed, a reasoned moral response to Dawson's character is impossible without access to a full range of information and the individual juror's freedom to consider moral values.

Dawson was not death eligible as a result of any consideration of his association with the Aryan Brotherhood or belief in racial bigotry. Thus, Delaware's decision to allow a full range of information about a defendant's character does not offend the First Amendment. Character evidence, by its very nature, is not "value-neutral" and, of course, racial intolerance is not a positive character trait. Dawson's efforts to control character evidence by labeling positive traits as mitigating evidence, but negative traits as protected speech or beliefs must be rejected.

ARGUMENT

NEITHER THE FIRST AMENDMENT NOR THE DUE PROCESS CLAUSE PREVENTS A SENTENCING JURY FROM CONSIDERING ALL EVIDENCE REFLECTING ON THE CAPITAL DEFENDANT'S CHARACTER, INCLUDING EVIDENCE THAT HE HAD EMBRACED A RACIST PRISON GANG.

This case involves the unique jurisprudence of capital sentencing and its requirement that the sentencer treat

each capital defendant as a unique individual. As Justice Blackmun has recently said: "[m]ore than any other decision known to our law, the decision whether to impose the death penalty involves an assessment of the defendant himself, not simply a determination as to the facts surrounding a particular event." *Clemons v. Mississippi*, 110 S.Ct. 1441, 1460 (1990) (dissenting opinion). According to Dawson, the jurors sitting at his penalty hearing making this assessment of his "character and propensities," Del. Code Ann. tit. 11, § 4209(d)(1)b (1987), could consider evidence that he joined Alcoholics Anonymous, earned good time credits while in prison, that he had not known his father and had been raised by relatives, that he had once offered to donate a kidney to a young dying cousin, and that he had an aunt and sister who still loved him. However, Dawson asserts that the federal Constitution bars other character evidence showing that during his tenure in prison, he had chosen to embrace a white racist prison gang calling itself the "Aryan Brotherhood."[6] Agreeing that one's beliefs and decisions to join

---

[6] Dawson and his *amici* suggest that the evidence presented at the penalty hearing was "speculative" about whether Dawson was a member of the Aryan Brotherhood and whether he shared its ideology of racism. Brief for Petitioner at 15; Brief for American Civil Liberties Union, *et al.*, as *amici curiae* at 5-6 & n. 3. However, at the penalty hearing, Dawson closed the link between the Aryan Brotherhood and his own views. In closing argument, defense counsel told the jurors that Dawson is an "Aryan Brother and a white supremacist," J.A. 117, but that the jurors should not allow their distaste for those beliefs nor his membership in the gang to influence their decision. In addition, the evidence showed that Dawson had the name of the gang inscribed on his hand. From that, the jury could easily

(Continued on following page)

groups shed light on a person's character, Dawson claims that the First Amendment permits him to argue, and juries to find, that such decisions and beliefs are mitigating factors in capital sentencing proceedings, but bars the prosecution from labeling in argument, and jurors from considering, such information as aggravating factors.

To support his argument, Dawson invokes two traditional First Amendment precepts: first, that criminal penalties can never be imposed nor aggravated because of an individual's beliefs; and secondly, that government – here in the form of his sentencing jury – must always remain "value-" or "content-neutral" within the realm of a person's beliefs or views. However, these traditional First Amendment precepts do not easily fit into a capital sentencing jurisprudence where the Eighth Amendment requires the sentencer to inquire into a capital murderer's "character" and then to decide whether to grant – or

---

(Continued from previous page)

infer that Dawson's embrace of the gang was not a fleeting one. Third, the jury was not required to overlook the gang's use of the name "Aryan," a term commonly linked to the doctrine of racial supremacy which reigned in Nazi Germany. From that name, as well as the stipulation's recital that the Brotherhood had begun "in response to other gangs of racial minorities," J.A. 84, the jurors could find that the Brotherhood's brand of racism went far beyond cellblock discussions of sociological data. Instead, the ideology of white supremacy held by the Brotherhood and of Dawson was that of racial hatred. Finally, Dawson should not now be able to object to the supposed blandness of the evidence after he successfully used the existence of the stipulation to prevent the introduction of other evidence, such as photographs of his swastikas, which more vividly reflected the nature of Dawson's views. *See* J.A. 54-58.

forego – the elusive concepts of mercy and leniency. To adopt Dawson's argument and make a capital defendant's beliefs off-limits from judgmental scrutiny would seriously undermine the Eighth Amendment's imperative that any death sentence " 'reflect' " the sentencer's " 'reasoned *moral* response to the defendant's background, character, and crime.' " *Penry v. Lynaugh*, 109 S.Ct. 2934, 2947 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)) (emphasis in original). Moreover, to accept his argument – which preserves to capital defendants the ability to offer the defendant's beliefs as "mitigating" evidence, but muzzles the prosecution – would make the process of "individualized" sentencing less reliable. In its difficult effort to appraise the defendant's character, the capital sentencer would be deprived of the "fullest information possible concerning the defendant's life and characteristics," focusing on "every aspect of [the] defendant's life." *Williams v. New York*, 337 U.S. 241, 247, 250 (1949).

1. The Eighth Amendment Imposes Few Limitations On The Evidence A Capital Sentencing Jury May Consider.

Over the last decade, the Court has generally refused to set any constitutional limits on the factors that may be placed before, and be considered by, a sentencing jury when it is called to make the decision whether a capital defendant should live or die. Instead, the Court's principal concern "has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the

defendant falls within the category of persons eligible for the death penalty." *California v. Ramos*, 463 U.S. 992, 999 (1983) (emphasis in original). Indeed, just last term, this Court reaffirmed that the Eighth Amendment applauds, rather than condemns, those capital sentencing schemes which allow " 'the jury to have as much information before it as possible when it makes the sentencing decision.' " *Payne v. Tennessee*, 59 U.S.L.W. 4814, 4817 (U.S. June 27, 1991) (No. 90-5721) (quoting *Gregg v. Georgia*, 428 U.S. 153, 204 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." *Ramos*, 463 U.S. at 1008.

At the same time, this Court has repeatedly emphasized that the Eighth Amendment compels the states to allow a capital defendant to put before the jury, virtually without limitation, *any* aspect of his "character," "background," or "the circumstances of the crime" which might move the sentencer to return a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982). *See also Penry*, 109 S.Ct. at 2946-47, 2951; *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986). Moreover, this Court has never suggested that the information flow to the sentencer on these criteria must spring only from the defense. The states remain free to allow the prosecution the leeway to offer "circumstances" and "factors" in "aggravation" beyond those used by the legislature to define the class of those convicted murderers eligible for the death penalty. *Zant v. Stephens*, 462 U.S. 862, 878

(1983). Indeed, to grant the capital defendant exclusive domain over presentation of the evidence on the crucial factors of the "nature of his crime" and his "character" and "background" would make the sentencing decision less reliable. It would "prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder." *Payne*, 59 U.S.L.W. at 4818.

Delaware has chosen a "Georgia" or "*Gregg*" procedure for determining when a convicted murderer should be sentenced to die. *Flamer v. State*, 490 A.2d 104, 134-36 (Del. 1983 and 1984), *cert. denied*, 464 U.S. 865 (1983) and 474 U.S. 865 (1985); *State v. White*, 395 A.2d 1082, 1085 (Del. 1978). First, in order to satisfy the Eighth Amendment's command that the class of murderers be narrowed to those who deserve to die, the sentencing jury must find the existence of at least one of the listed statutory aggravating circumstances. Del. Code Ann. tit. 11, §§ 4209(d)(1)a, (e)(1) (1987) (*reproduced in part* at Brief for Petitioner at 3). Once past that threshold, the jurors can look to "all relevant evidence in aggravation or mitigation which bears upon the circumstances or details of the commission of the offense and the character and propensities of the offender" to determine whether death remains the appropriate penalty. § 4209(d)(1)b (Brief for Petitioner at 3). Any evidence is material so long as it is "relevant and admissible to the penalty to be imposed." § 4209(c)(1) (Brief for Petitioner at 2-3). Consequently, both the prosecution and the defendant may offer a wide range of evidence probative of "all the specific circumstances of the crime and the defendant." *White*, 395 A.2d at 1089. *See, e.g., Deputy v. State*, 500 A.2d 581, 598 (Del.

1985) (defense offered "mitigating" evidence consisting of records of defendant's prior psychiatric commitments, testimony by ministers and lay instructor of work with defendant in jail, and testimony by defendant describing his reverence and change of lifestyle), *cert. denied*, 480 U.S. 940 (1987); *DeShields v. State*, 534 A.2d 630, 649 (Del. 1987) (defense offered "mitigating" evidence that accused was model prisoner, that relatives still loved him, and that he had had a troubled youth), *cert. denied*, 486 U.S. 1017 (1988). As under the Georgia scheme, in Delaware, the jury, in making its ultimate decision, has unconstrained discretion to choose life, rather than death, without regard to the aggravating or mitigating circumstances or to their comparative weights. *Whalen v. State*, 492 A.2d 552, 560 (Del. 1985). The jury can return a verdict of life imprisonment for any reason or for no reason at all. *See* J.A. 131 (jury instructions).

It is against this background that Dawson's challenge to his jury's consideration of the Aryan Brotherhood prison gang evidence must be measured.

2. An Evaluation Of a Capital Defendant's "Character" Permits an Inquiry Into His Racist Beliefs And Involves The Exercise of Judgment by the Sentencing Jury.

The parties do share one common piece of ground. In this Court, as he did in the trial court (J.A. 41), Dawson concedes that his conscious choice to embrace both the Aryan Brotherhood and its white supremacist ideology does indeed reflect something about his "character", as that term is commonly understood. *See* Brief for Petitioner at 23 ("Our beliefs may shed light on our character

in all sorts of ways. . . . "). One's beliefs, one's expressions, and one's conscious conduct – which in many cases may simply be a symptom of one's thoughts or beliefs – both define and reflect one's "character" or "personality."[7]

Of course, Delaware has not made it a criminal offense to believe in or publicly express racist ideology. *See Brandenburg v. Ohio*, 395 U.S. 444, 446-49 (1969) (*per curiam*). David Dawson was not before a sentencing jury because he was a white supremacist. So too, Dawson was not facing the death penalty because of his embrace of the Aryan Brotherhood. Neither one's belief in racial superiority nor one's association with a racist gang constitutes a statutory aggravating circumstance under Delaware's capital sentencing statute.[8] Instead, Dawson became eligible for the death penalty because he intentionally killed Madelene Kisner during a burglary and robbery in her home after he had escaped from prison. It was that *conduct* which the community, through the Delaware legislature, has defined as "so grievous [an] affront to humanity that the only adequate response may be the penalty of death." *Gregg*, 428 U.S. at 184 (opinion of Stewart, Powell, and Stevens, JJ.). Here, the evidence of Dawson's embrace of the Aryan Brotherhood became relevant only

[7] Indeed, to some, the purpose of the freedom of speech clause is to allow development of a person's autonomous personality. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[8] Admittedly, the Constitution might bar a state legislature from using racial ideology as a death penalty trip wire. *Zant v. Stephens*, 462 U.S. 862, 885 (1983). However, Dawson's reading of *Zant* as barring any consideration of the defendant's beliefs goes too far.

when the sentencing jury, as the "conscience of the community," *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968), had to decide whether "to afford mercy." *Gregg*, 428 U.S. at 203 (opinion of Stewart, Powell, and Stevens, JJ.).[9] At that discretionary stage, each juror could look, not only to details of Dawson's crime, but to his "character" to see if he "ha[d] virtues that can fairly be balanced against society's interest in killing him in retribution for his violent crime." *Franklin v. Lynaugh*, 487 U.S. 164, 189 (1988) (Stevens, J., dissenting). As one commentator has said, explaining jurors' use of such "character" evidence in this part of the capital sentencing process:

> To assume that jurors act of pure moral retribution is to assume they focus on the crime more than the criminal and hence rely chiefly on the aggravating circumstances. Certainly the presence of very serious aggravating factors makes the defendant a strong *prima facie* candidate for death. But if jurors pay at least some attention to mitigating evidence, they would not seem to be acting out of pure moral retribution. If the jurors

[9] The Delaware capital punishment statute, unlike those in some other states such as Pennsylvania, *see Blystone v. Pennsylvania*, 110 S.Ct. 1078, 1081-82 (1990), does not create an evidentiary presumption in favor of death once the jury determines that statutory aggravating circumstances exist. Indeed, the Delaware statute tilts toward the exercise of mercy: death can be imposed only if the jury, after passing the statutory aggravating circumstances threshold, unanimously recommends that sentence after considering a wide gamut of evidence. However, the statute's allocation of evidentiary burdens does not change the basic premise that the statutory aggravating circumstances define those killings which warrant the imposition of the death penalty, the jury's focus thereafter being directed at deciding whether to forego that sanction.

> do assess the defendant's general character, or the excuses he offers for the murder, at best we can say that they will act out of moral retribution when the crime is otherwise unredeemed by the defendant's good qualities or excused by psychological causes.

Weisberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305, 390-91. Of course, at this discretionary stage, the inquiry may be far reaching; any evidence may be relevant so long as it might shed light on whether death is the appropriate penalty. Contrary to Dawson's premise, the evidence is not limited to evidence of the capital defendant's past conduct. For example, in seeking to move the jury towards leniency, the defendant can presumably put before the sentencer evidence of his own beliefs, such as "that he had a great love for the victim's race, or that he had a pathological hatred for the victim's race," or indeed "that he despised his mother." *Walton v. Arizona*, 110 S.Ct. 3047, 3062 (1990) (Scalia, J., concurring). A person's beliefs have never been outside the relevant scope of the sentencer's inquiry.

So too, the inquiry is not one where the sentencer can remain "value-neutral" in response to such evidence. As this Court has recognized, the inquiry in this final phase requires the "individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant," *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987), in order to render a "reasoned moral response." *Penry*, 109 S.Ct. at 2947. But if the inquiry is a moral one calling for the exercise of discretion, it cannot be one devoid of value judgments about the nature of the defendant's conduct or beliefs: concepts of "good," "bad," "redeeming," and "unredeeming" permeate the entire

inquiry. No individual juror can determine whether a defendant possesses "redeeming qualities," *Boyde v. California*, 110 S.Ct. 1190, 1208 (1990) (Marshall, J., dissenting), or has "positive character traits," *Franklin*, 487 U.S. at 186 (O'Connor, J., concurring), nor can she or he evaluate whether the defendant's murderous conduct was "an aberration from otherwise good character," *Boyde*, 110 S.Ct. at 1199 n. 5, without bringing to bear his or her own "moral, factual, and legal judgments." *Barclay v. Florida*, 463 U.S. 939, 950 (1983) (plurality opinion). Once again, by example, capital defendants, within and without Delaware, routinely offer evidence of prior religious devotion or a belated religious rebirth as reasons for the jurors to grant mercy. *See, e.g., Deputy v. State*, 500 A.2d 581, 598 (Del. 1985) (testimony from defendant, three ministers, and Bible reader about defendant's religious rebirth and his reverence while incarcerated), *cert. denied*, 480 U.S. 940 (1987); *People v. Belmontes*, 755 P.2d 310, 339-41 (Cal. 1988) (testimony about defendant being "born again" and subsequent relationships with church members), *cert. denied*, 488 U.S. 1034 (1989); *State v. Beuke*, 526 N.E.2d 274, 279 (Ohio 1988) (testimony of defendant's religious orientation and participation in the Boy Scouts). *See also Evans v. McCotter*, 790 F.2d 1232, 1242 & n. 10 (5th Cir.) (testimony of defendant's conversion to Christianity), *cert. denied*, 479 U.S. 922 (1986).[10] Similarly, a capital defendant may, in

---

[10] Clearly, the defense purpose in offering evidence of religious devotion is to show something more than the defendant will not, because of his religious beliefs, be a danger to others in the future. Indeed, where the defendant's evidence points to religious devotion preceding the homicidal act, it may be

(Continued on following page)

an effort to convince the jurors to be lenient, also produce evidence of association with organizations such as the Boy Scouts. *See, e.g., Black v. State*, No. 69,648 (Tex. Crim. App. May 29, 1991) (1991 WL 87594).[11] Unlike some states, the Delaware legislature does not dictate which facts, if proven, have a mitigating effect. *Cf. Mills v. Maryland*, 486 U.S. 367, 376 n. 8 (1988). Dawson's jury was therefore called upon to determine 1) what facts reflecting on Dawson's character were proven; 2) whether the character traits were non-statutory aggravating factors or were mitigating factors; and 3) as to all of the evidence in aggravation or mitigation, what weight to assign to each factor. *See* J.A. 131 (jury instructions). Yet, if such evidence of religious devotion and community service are admissible because they represent "positive character traits," *Franklin*, 487 U.S. at 186 (O'Connor J., concurring), sentencing jurors can give effect to such evidence only if they agree that the defendant's past or present beliefs in religious principles or his past decision to accept the tenets of the Boy Scouts or Alcoholics Anonymous represent admirable "virtues" which should be assayed against imposing death for his crime.

(Continued from previous page)

difficult to convince a jury his devotion renders him non-dangerous. Instead, the defense argument concerning religious devotion is in large part a moral one, an attempt to show the jury that the defendant was generally, or has become since the crime, a good person, or at least a better one, than he was when he committed the murder. Kaplan, *Evidence in Capital Cases*, 11 Fla. St. L. Rev. 369, 375-76 (1983).

[11] Dawson told the jury that he earned good time credits by joining Alcoholics Anonymous while in prison. J.A. 79.

Of course, if based on those traits, one or more jurors elect to forego the death penalty, that particular defendant will not have been "penalized" for his religious beliefs or his association with the Boy Scouts. Yet, the extent of his punishment – life imprisonment instead of death – will still have turned on the jury's consideration of his beliefs and the jurors will not have remained value-neutral in scrutinizing those beliefs. Moreover, in a broader context, the jurors' decision to forego death based on such factors does in effect "penalize" all those other capital defendants who might be sentenced to die because they had rejected religious beliefs or found the underlying tenets of the Boy Scouts or Alcoholics Anonymous objectionable and thus could not present such evidence.

What is apparent from all this is that the usual First Amendment precepts barring governmental inquiries into beliefs and obligating the government to remain value-neutral concerning such beliefs have no application to the final discretionary stage of capital sentencing. On the contrary, in those proceedings "[i]t is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing." *Barclay*, 463 U.S. at 950 (plurality opinion).[12] "[A]t least, in the

---

[12] Dawson argues that because Mrs. Kisner and he were white, the evidence concerning his embrace of the Aryan Brotherhood could not be connected in any way to the murder. Without such a connection, he says it was irrelevant. Brief for Petitioner at 15-16. In so arguing, Dawson applies a much stricter definition of "connection" than has been typically used during the capital sentencing "character" inquiry. Sentencing

(Continued on following page)

absence of racial prejudice, jurors may legitimately exercise their conscience or conventional moral judgment in choosing which murderers to execute." Weisberg, 1983 Sup. Ct. Rev. at 389.

Indeed, in *Barclay*, this Court seemingly faced the same challenge Dawson now raises. In his concurring opinion, Justice Stevens, joined by Justice Powell, rejected it. Barclay had joined with three others to form a group, which they styled the "Black Liberation Army." The shared tenets of the small group were hatred of white people and the need for liberating racial war. Hoping to trigger such a clash, the members of the group kidnapped and killed a young hitchhiker, and then after the killing

---

(Continued from previous page)

jurors, at this stage, are regularly granted the freedom to make their own evaluation of the causal connection between the capital defendant's act of murder and seemingly remote events, such as much earlier mistreatment of the defendant by a father and mother. *See Penry*, 109 S.Ct. at 2941-42; *Eddings*, 455 U.S. at 113-14.

Here a rational juror could draw a connection between Dawson's embrace of the racist ideology of the Aryan Brotherhood and his subsequent killing of Mrs. Kisner. At heart, racism is rooted in depersonalization; the racist refuses to see members of other races as individuals with unique qualities and worth. Likewise, Dawson's murder of Mrs. Kisner was the "ultimate act of depersonalization." *Payne*, 59 U.S.L.W. at 4820 (O'Connor, J., concurring). Jurors could see the murder as an "escalation" of Dawson's racist beliefs: Dawson's inability to grant respect to the individual worth and dignity of persons of another race had now grown into an unwillingness to grant respect to the individual worth or dignity of *any* human being. From this, the jurors could surmise that Dawson would remain dangerous in the future.

sent to both the media and the victim's mother messages urging mass racial violence. In sentencing Barclay to die for this murder, the Florida sentencing judge relied on his own abhorrence to the ideas of racial hatred and the need for a race war, indicating that he thought that anyone who chose to attempt to initiate such a diabolical course should be permanently removed from society by execution. *See* 463 U.S. at 948 n. 6 (reproducing trial judge's findings).

In this Court, Barclay argued that the sentencing judge should not have been able to rely on his distaste for Barclay's views on racial strife as grounds for imposing the death penalty. The plurality summarily rejected the challenge, finding that circumstances of racial hatred in the murder related to several of Florida's statutory aggravating circumstances. 463 U.S. at 949 (plurality opinion). Justice Stevens took a differing tack. After surveying the Florida capital sentencing scheme, Justice Stevens initially concluded that the evidence of Barclay's beliefs in racial hatred, evidenced by both his conduct and the messages sent after the killing, were aspects of Barclay's "background" that, under the federal Constitution, could be considered by the capital sentencer. 463 U.S. at 968-69 (concurring opinion). However, from there, he parted company with the plurality, finding that the trial judge's exposition of his deeply felt concern about racial crimes "had no bearing on any statutory aggravating circumstance." *Id.* at 970. Thus, he assumed that the Florida legislature had not singled out for more severe sanction in its capital sentencing scheme murders motivated by racial hatred. Yet, the absence of such a legislative determination did not undermine the legitimacy of Barclay's

ultimate sentence. Instead, the sentencing judge's reactions to the diabolical nature of Barclay's beliefs were valid considerations in the third stage of the Florida sentencing procedure, the stage when the sentencer had to exercise its discretion and determine if, despite all else, death was the appropriate penalty. *Id.* at 970 n. 18. At that stage, "[t]he sentencing process assumes that the trier of fact will exercise judgment in light of his or her background, experiences, and values." *Id.* at 970. Pointedly, if the trial judge in *Barclay* could use the evidence of Barclay's beliefs in racial strife as an aspect of the defendant's "background" in deciding whether to grant or withhold leniency, then Dawson's sentencing jury could rightfully consider his embrace of the Aryan Brotherhood with its racist tenets as relevant character evidence in deciding whether to impose a penalty less than death.[13]

---

[13] Of course, in *Barclay*, the defendant's views and beliefs in "racial hatred" had not been simply abstract expressions, but had also been the motive for the murder. However, as noted before, "racial hatred" was not a statutory aggravating circumstance in Florida. Thus, when the sentencing judge condemned Barclay to die, he was still, for traditional First Amendment analytical purposes, foregoing value- or content-neutrality and imposing a "penalty" on Barclay for holding what the judge viewed as reprehensible ideas. As Professor Tribe has explained using an analogous hypothetical involving actual speech:

> To be sure, one who incites arson against an NAACP headquarters in a racist speech is more reprehensible than one who incites the very same arson to collect insurance proceeds, but to punish the former more severely than the latter is, arguably, to penalize a reprehensible viewpoint *as such*.

(Continued on following page)

Finally, there is something lopsided to Dawson's argument that precepts of value- and content-neutrality must apply to the discretionary stages of capital sentencing proceedings. He strenuously argues that it violates the First Amendment when the prosecutor offers evidence of the defendant's beliefs and the sentencing jurors attach a supposedly "aggravating" label to that evidence. Yet, he is silent about whether the precept of content-neutrality is transgressed when a criminal defendant offers evidence of his beliefs, such as religious devotion, in the hope that the jury will attach to them a "mitigating" label. To endorse an asymmetrical application of First Amendment constraints would undercut the Eighth Amendment's goal of reliability in capital sentencing, running counter to this Court's recent pronouncement that, in capital sentencing proceedings, "[t]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in." *Payne*, 59 U.S.L.W. at 4818 (quoting *Booth v. Maryland*, 482 U.S. 496, 517 (1987) (White, J. dissenting)). In effect, Dawson seeks to constitutionalize a one-sided view of a capital defendant's character: evidence which touches on a defendant's beliefs can mitigate, but not aggravate punishment. The decisions of this Court do not support that proposition.

(Continued from previous page)

L. Tribe, *American Constitutional Law* § 12-17 at 926 (2nd ed. 1988). In light of this, Dawson cannot distinguish his argument from the one rejected by Justice Stevens in *Barclay* simply on the basis that in his prosecution there was no direct connection between his murder and his embrace of the racist Aryan Brotherhood.

3. Racial Hatred and Capital Sentencing.

In arguing here that Dawson's sentencing jury could quite properly hear evidence of his embrace of the racist prison gang styled the Aryan Brotherhood, respondent does not suggest that, at capital penalty hearings, state prosecutors may offer evidence of *any* and *all* beliefs of the capital defendant to be factored into the sentencing decision by the sentencer. Distinctions can and must be drawn.

As exemplified by the proceedings on Dawson's objections to the "Aryan Brotherhood" evidence, all such evidence is not automatically admissible. In Dawson's case, the trial court's approach was to undertake a two-step analysis. First, the trial judge made a threshold determination of the evidence's logical relevance to Dawson's character. Finding this evidence to be probative of Dawson's character, the judge then proceeded to inquire whether its "probative value is outweighed by the danger of unfair prejudice." J.A. 52. This second step was aborted by Dawson's agreement to the stipulation defining the Aryan Brotherhood. J.A. 52-53. On appeal, however, the Delaware Supreme Court[14] found that the evidence did not "improperly appeal to the jurors' passions and prejudices concerning race, religion, or political affiliation." J.A. 191 (581 A.2d at 1103). Thus, although there is no *per se* rule that bars evidence of a defendant's beliefs as

[14] The state court has an independent statutory responsibility to consider whether the "death penalty was either arbitrarily or capriciously imposed or recommended." Del. Code Ann. tit. 11, § 4209(g)(2)a (1987).

reflective of his "character" under the First Amendment, this does not mean that "unduly prejudicial" evidence can not be excluded under the Due Process Clause. *See Payne*, 59 U.S.L.W. at 4818.

Moreover, evidence reflecting on a capital defendant's enthusiasm for the ideology of racism stands on a much different footing than evidence of other possible beliefs, such as religious principles or political affiliation. If the "individualized assessment of the appropriateness of the death penalty is a moral inquiry," *Brown*, 479 U.S. at 545 (O'Connor, J., concurring), then the prosecution should only be able to place before the sentencing jury evidence of "beliefs" around which there has been an enduring moral consensus. There is such an enduring consensus about the doctrines of racism and racial superiority. The concept of equality among individuals regardless of one's race is – like the concept of freedom of speech – one of the fundamental precepts of the nation. Thus, while the Declaration of Independence included the right to rebel, it also proclaimed that "all men are created equal," although admittedly the pronouncement had a limited reach to men, and then only certain men. Declaration of Independence (1776). Nearly one hundred and forty years ago, we fought a bloody internecine war to expand that pledge to all those within this nation. Moreover, within the last generation this country waged a protracted war against a Nazi government committed to a devastating application of the ideology of racial superiority. Nor is our rejection of the ideology of racism merely a passing fancy of a contemporary majority. The Thirteenth, Fourteenth, and Fifteenth Amendments to the

Constitution make the elimination of the doctrine of racism a national goal of the utmost importance.[15] Indeed, the ideology of racial supremacy strikes at our fundamental notion that each person should be treated as a "uniquely individual human being[]." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)

The First Amendment may restrain government from criminalizing such racist beliefs. But any sense of tolerance which prevents society and government from seeking to suppress the expression of such beliefs does not require us to refrain from condemning such ideology as morally reprehensible. *See Bob Jones University v. United States*, 461 U.S. 574, 603-04 (1983) (First Amendment does not require government to give tax exemption to religious school practicing racial discrimination). *Cf. Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The Constitution cannot control such prejudices but neither can it tolerate them."). Freedom of speech does not require society to remain silent and withhold condemnation of racism; to do so would only seem to endorse its precepts. Thus, when one, such as Dawson, has committed a heinous murder in such a manner which the legislature has deemed sufficient reason to call for the response of the death penalty, it is neither illegitimate nor unconstitutional for the sentencing jury to weigh against a grant of the largess of mercy

---

[15] Equality between individuals and freedom from racism is a norm of worldwide acceptance. *See* United Nations Charter art. 55(c); Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).

the fact that one of the "virtues" of the criminal defendant is that he espouses the ideology of racial supremacy. *Cf. Rust v. Sullivan*, 111 S.Ct. 1759, 1772 (1991) (quoting *Maher v. Roe*, 432 U.S. 464, 475 (1977)) (" 'There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.' ")

4. The Aryan Brotherhood Evidence Was Relevant to the Sentencing Process.

If the First Amendment does not bar the introduction of the Aryan Brotherhood evidence, the only remaining questions are whether such evidence was relevant to the sentencing decision and whether it was presented in a fundamentally fair manner. Clearly, the Aryan Brotherhood evidence met the criteria of relevancy. First, the evidence was "relevant to show the appropriateness of the alternative punishment of [life] imprisonment [for Dawson]." *Franklin*, 487 U.S. at 190-91 (Stevens, J., dissenting). Here, as the prosecutor explained to the jury (*see* J.A. 105-06), Dawson's deliberate choice to join a prison gang stood as a counter-point to any argument that his sporadic participation in prison programs during his long years of incarceration showed that Dawson had "not [been] just sitting in prison lying around doing nothing." J.A. 121. The jurors could take from the fact that Dawson had had the gang's insignia tattooed on his body that his enthusiasm for the gang far outran his commitment to participating in rehabilitative prison programs. Furthermore, as the Delaware Supreme Court recognized, against the backdrop of a history of escapes and institutional misconduct, Dawson's decision to join a gang could be

seen as one more indication of his consistent mindset to reject any meaningful attempt to rehabilitate himself. J.A. 187 (581 A.2d at 1101-02). Such an inference was legitimate. As this Court once affirmed, in an analogous, but non-capital, sentencing context:

> "Impressions about the individual being sentenced – the likelihood that he will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, *the degree to which he does or does not deem himself at war with society* are, for better or worse, central factors to be appraised under our theory of individualized sentencing."

United States v. Grayson, 438 U.S. 41, 51 (1978) (quoting *United States v. Hendrix*, 505 F.2d 1233, 1236 (2nd Cir. 1974)) (emphasis added). From all the evidence surrounding Dawson's earlier days in prison, including his choice to join a gang, the jurors could infer Dawson "was still disposed to evil and determined to remain hostile to society." *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937).

Moreover, the evidence of Dawson's adoption of the Brotherhood's racist ideology acted as a counterbalance to any mitigating evidence which the defendant might put before the jury of his redeeming qualities or positive character traits. That evidence acted to give the sentencing jury a complete picture of the personality of Dawson, showing a side of Dawson that stood in stark contrast to the picture of a loved nephew and brother and one who had offered to donate one of his kidneys to a dying young child. It was relevant to simply preserve "parity between mitigating and aggravating factors." *Payne*, 59 U.S.L.W. at 4820 (Scalia, J., concurring).

Lastly, in this particular case, there was little likelihood that the presentation of the Aryan Brotherhood evidence risked a sentencing verdict "impermissibly based on passion, not deliberation." *Payne*, 59 U.S.L.W. at 4821 (Souter, J., concurring). In the beginning of trial, in order to insure that the evidence would be considered with reason, not emotion, the trial court had questioned each of the prospective jurors about his ability to judge such evidence, excusing those who would not be able to consider it dispassionately. Tr. B-148-49, 170-71, 248-50; Tr. D-13-17, 57-58, 77-78. The jury received evidence about the Aryan Brotherhood through a stipulation which Dawson described on appeal as "relatively 'sterile.' " J.A. 185 (581 A.2d at 1101). Dawson could, and did, offer argument that his beliefs in white supremacy should not negate leniency and that the sentencing jury should continue to exercise toleration. J.A. 115-17. The prosecutor's argument to the jury also carefully avoided a call for an emotional reaction. Instead, as the prosecutor described it, Dawson's decision to join a racist prison gang stood in sharp contrast to any suggestion that his years in prison had led or would lead to rehabilitation. J.A. 106 ("Where is going to AA [Alcoholics Anonymous] compare with proclaiming yourself an Aryan Brother?"). Because this evidence fairly spoke to Dawson's character as a unique individual, the jurors could properly consider it in exercising their discretion to extend leniency or impose the death sentence.

CONCLUSION

For the above reasons, this Court should affirm the decision of the Delaware Supreme Court upholding Dawson's death sentence.[16]

---

[16] At the penalty hearing, Dawson did not object to the sentencing jury learning that he had a tattoo of the name "Abbadon" or that he identified himself by that moniker several hours after the murder and explained that it meant "one of Satan's disciples." J.A. 57 (counsel's position); J.A. 80-81, 85-86 (evidence). In the Delaware Supreme Court, he unsuccessfully sought to overturn his sentence based on the admission of that evidence. J.A. 185, 187-92 (581 A.2d at 1100, 1101-03). However, in this Court, Dawson has not, in his initial petition or in his brief, raised any challenge about the admission of the "Abbadon" evidence. In fact, he has relegated his discussion of it to a footnote in his brief. Brief for Petitioner at 12 n. 5. In contrast, his *amici* suggest that the "Abbadon" evidence is an alternative ground to overturn the death sentence. Brief for American Civil Liberties Union, *et al.*, as *amici curiae* at 3, 5, 12. In light of Dawson's apparently deliberate decision to forego challenging the Abaddon evidence, the question of its admissibility should not be before this Court. Supr. Ct. R. 14.1(a). *See Holland v. Illinois*, 110 S.Ct. 803, 811 n. 3 (1990).

In addition, the Abbadon evidence was different in kind from the evidence of Dawson's embrace of the Aryan Brotherhood. Although the moniker has a religious origin and its definition refers to the religious symbolism of angels, *see* J.A. 188 n. 26 (581 A.2d at 1102 n. 26), no attempt was made to use the evidence to link Dawson to any religious belief or sect. Indeed, the prosecution cautioned the sentencing jury not to make any such connection. J.A. 105. Instead, as the Delaware Supreme Court recognized, the evidence was introduced to show how Dawson saw his own *persona*. J.A. 187 (581 A.2d at 1102). The inference to be drawn from the evidence was no different than the one arising if Dawson had a tattoo of the

(Continued on following page)

Respectfully submitted,

CHARLES M. OBERLY, III
Attorney General of the
State of Delaware

RICHARD E. FAIRBANKS, JR.
Chief of Appeals Division

GARY A. MYERS
Deputy Attorney General
Counsel of Record

LOREN C. MEYERS
Deputy Attorney General

Delaware Department of Justice
1 South Race Street
P.O. Box 508
Georgetown, DE 19947
(302) 856-5353

July 26, 1991

(Continued from previous page)

word "killer" and had described himself as such after the murder at the bar in Milford. *See Jones v. Butler*, 827 F.2d 1006, 1011-12 (5th Cir. 1987), *cert. denied*, 486 U.S. 1046 (1988). By hearing that Dawson had declared, not only throughout his life, but right after the murder, that he saw himself as "one of Satan's disciples," the jurors could decide that Dawson, in his own mind, did not see his killing of Mrs. Kisner to be "an aberration of otherwise good character." *Boyde*, 110 S.Ct. at 1199 n. 5.

Supreme Court, U.S.
FILED
AUG 28 1991
OFFICE OF THE CLERK

No. 90-6704

In The

Supreme Court of the United States

October Term, 1991

DAVID F. DAWSON,

Petitioner,

v.

DELAWARE,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Delaware

REPLY BRIEF FOR PETITIONER

LAWRENCE M. SULLIVAN
Public Defender of the
State of Delaware

BERNARD J. O'DONNELL
Assistant Public Defender
Counsel of Record

BRIAN J. BARTLEY
Assistant Public Defender

Office of Public Defender
820 North French Street
Wilmington, Delaware 19801
(302) 577-3230

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT:

DAWSON'S SENTENCE OF DEATH IS INVALID BECAUSE THE STATE OF DELAWARE ASSERTED PROTECTED BELIEFS AND ASSOCIATION TO SUPPORT A SENTENCE OF DEATH 1

A. The First Amendment Bars a State From Inviting a Jury to Sentence a Defendant to Death Because of His Protected Beliefs or Associations 1

B. Beliefs and Associations Protected by the First Amendment are not *Per Se* Relevant to Warrant the Execution of a Defendant Convicted of Murder. Only Very Limited Use of Such Evidence, Not Present in the Instant Case but Illustrated in *Barclay v. Florida* and *United States v. Abel*, Would Be Permitted on Narrow and Traditional Grounds Under the Eighth Amendment 8

C. No Principle of "Parity" or "Symmetry" Espoused by Delaware Under the Eighth Amendment Prohibiting Cruel and Unusual Punishment Would Permit the State to Execute a Defendant Although His Beliefs and Associations Would Ordinarily be Protected by the First Amendment 13

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES:

Barclay v. Florida, 463 U.S. 939 (1983) 8

Barefoot v. Estelle, 463 U.S. 880 (1983) 8

Blystone v. Pennsylvania, 494 U.S. 299 (1990) 2

Bordenkircher v. Hayes, 434 U.S. 357 (1978) 17

Brandenburg v. Ohio, 395 U.S. 444 (1969) 9

Brown v. Board of Education, 347 U.S. 483 (1954) 13

Brown v. Mississippi, 297 U.S. 278 (1936) 3

Buchanan v. Kentucky, 483 U.S. 402 (1987) 18

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 13

Caldwell v. Mississippi, 472 U.S. 320 (1985) 3

Chambers v. Mississippi, 410 U.S. 284 (1973) 3

Coker v. Georgia, 433 U.S. 584 (1977) 7

Dawson v. State, 581 A.2d 1078 (Del. 1990) 11

Estelle v. Smith, 451 U.S. 454 (1981) 18

Furman v. Georgia, 408 U.S. 238 (1972) 6

Gebhart v. Belton, 91 A.2d 137 (Del. 1952), modified *sub. nom., Brown v. Board of Education*, 347 U.S. 483 (1954) 13

Gregg v. Georgia, 428 U.S. 153 (1976) 7, 12, 15

Harris v. New York, 401 U.S. 222 (1971) 9

Harrison v. United States, 392 U.S. 219 (1968) 10

Idaho v. Wright, 110 S.Ct. 3139 (1990) 3

TABLE OF AUTHORITIES – Continued

Page

Jackson v. Denno, 378 U.S. 368 (1964) 3

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 11

McKoy v. North Carolina, 110 S.Ct. 1227 (1990) 14

Michigan v. Harvey, 110 S.Ct. 1176 (1990) 9

North Carolina v. Pearce, 395 U.S. 711 (1969) 17

Olden v. Kentucky, 488 U.S. 227 (1988) 3

Oregon v. Hass, 420 U.S. 714 (1975) 9

Payne v. Tennessee, 111 S.Ct. 2597 (1991) 2, 8, 12, 15

Texas v. Johnson, 491 U.S. 397 (1989) 9

United States v. Abel, 469 U.S. 45 (1984) 8, 9

United States v. Bakker, 925 F.2d 728 (4th Cir. 1991) 16

United States v. Havens, 446 U.S. 620 (1980) 9

Weddington v. State, 545 A.2d 607 (Del. 1988) 13

Zant v. Stephens, 462 U.S. 862 (1983) 4, 5

UNITED STATES CONSTITUTION

First Amendment ..... *passim*

Eighth Amendment 2, 6, 8, 13

STATUTE AND RULE

Delaware Rule of Evidence 403 11

ARGUMENT

DAWSON'S SENTENCE OF DEATH IS INVALID BECAUSE THE STATE OF DELAWARE ASSERTED PROTECTED BELIEFS AND ASSOCIATION TO SUPPORT A SENTENCE OF DEATH.

A. The First Amendment Bars a State from Inviting a Jury to Sentence a Defendant to Death Because of His Protected Beliefs or Associations.

The Respondent stakes its case on the broad proposition that the First Amendment imposes no restriction whatsoever upon the kind of evidence that can be used to support a death sentence at the final, "discretionary" stage of a two-stage " 'Georgia' type" of capital sentencing procedure. RB 29. It claims that ideological views that a State could neither criminalize nor use to make a capital defendant death-eligible at the "threshold" sentencing stage may be freely used at the "discretionary" stage as sufficient reasons for killing him. RB 29-30. The Government's position is the same but broader and it applies to noncapital sentencing as well: since a "defendant's attitudes, beliefs and associations often are highly relevant" to sentencing, GB 8, they can be used in aggravation without constraint by the First Amendment. *E.g.*, GB 8-9, 14, 16, 19-20.

All of this amounts to saying that a prosecutor can request, and a jury can return, a death verdict based on any ideology that the judge or jury deems sufficiently odious as a basis for a death sentence which the jurors may not otherwise have chosen to impose. If the First Amendment's prohibition against punishing unpopular

beliefs and ideas means anything, this result cannot be correct.

In contrast to the respondent's bold claim, the Court has again recently confirmed that in death penalty proceedings "[t]he state laws respecting crimes, punishments and criminal procedure are of course subject to the overriding provisions of the United States Constitution. Where the State imposes the death penalty for a particular crime we have held that the Eighth Amendment imposes special limitations upon that process." *Payne v. Tennessee*, 111 S.Ct. 2597, 2607-08 (1991). In addition, only "[w]ithin the constitutional limitations defined by our cases, [do] States enjoy their traditional latitude to prescribe the method by which those who commit murder should be punished." *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990).

Thus, it is the essence of the First Amendment, not the nemesis of the Eighth Amendment, that a State is barred from asking a jury to impose a sentence of death as a result of a defendant's ideological belief, no matter how odious that belief might be.

The only safeguard that the Respondent or the Government offers for the plainly unacceptable consequences of their positions is the illusory premise that First Amendment protection is unnecessary to avoid those consequences because of other safeguards in the capital sentencing process. RB 34-35; GB 24-26.

Specifically, both the Respondent and the Government rely on evidentiary rules and point to state-law requirements that the trial judge must find aggravating evidence (like any evidence) "relevant," and must also

exclude it if its prejudicial impact substantially outweighs its probative value (under Delaware Evidence Rule 403, which corresponds to the same-numbered rule in the Federal Evidence Rules). RB 34-35; GB 24-35. The notion that federal constitutional protections are unneeded because the States' rules of evidence provide an all-purpose safeguard against constitutional excesses has been found factually inaccurate and legally unpersuasive in case after case since *Brown v. Mississippi*, 297 U.S. 278 (1936). See, *e.g.*, *Idaho v. Wright*, 110 S.Ct. 3139 (1990); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Jackson v. Denno*, 378 U.S. 368 (1964). Here it is particularly disingenuous, for two reasons. First, the state evidentiary rules invoked, dealing with "relevance" and "prejudice," are primarily concerned with quite different interests than the First Amendment, and therefore strike balances inconsistent with First Amendment values. *Cf. Olden v. Kentucky*, 488 U.S. 227 (1988). Second, the basic conceptual position espoused by the Respondent and the Government, and by the Supreme Court of Delaware, renders these state-law evidentiary "safeguards" illusory. The Respondent, the Government, and the Delaware Supreme Court all simply assert that all facets of a defendant's "character" are *per se* relevant to capital sentencing and that a defendant's attitudes, beliefs, and associations are equatable with "character" for this purpose. RB 23-30; GB 8-9, 13-14; J.A. 188. On this premise, the application of the rule of "relevancy" to evidence of ideology proffered in aggravation simply means that the judge and jury are to make *ad hoc* determinations of which ideologies are obnoxious enough to

call for death; and "probative-prejudice balancing" simply means that the judge is somehow to discriminate between the more and less rational tendencies of a jury to condemn defendants for particular protected beliefs based on the content and nature of those beliefs.

The Respondent and the Government also suggest that a case-by-case Due Process adjudication as to whether ideological evidence is "unduly prejudicial", RB 35, or renders a trial "fundamentally unfair", GB 25, is available and superior to a *"per se* [First Amendment] rule". RB 34; GB 24-25. The supposed superiority of the government's Due Process approach stands the theory and history of constitutional jurisprudence on its head by implying that the fact-specific application of a general Due Process constraint upon capital sentencing would be *less* of an intrusion on the autonomy of state criminal law or *less* productive of litigation than a narrower First Amendment rule. Compare GB 21-23 with GB 24-25. But, in any event, the Respondent's and the Government's fundamental premise – that core belief or speech, essentially deviant ideology unmanifested in action, *is* the kind of "character" evidence they may use to call for a death sentence – deprives their proposed Due Process safeguard of any constitutional basis upon which to work. It is only by contrast to the beliefs of a judge or jury as a norm, that evidence can be held either "unduly prejudicial" or "fundamentally unfair," when the very basis of its relevance is to show that the defendant thinks, believes or associates obnoxiously.

The government contorts *Zant v. Stephens,* 462 U.S. 862 (1983), as well. Here its efforts are directed to

eviscerating *Zant*'s "suggestion . . . that a statutory aggravating factor is constitutionally invalid if it 'authorizes a jury to draw adverse inferences from conduct that is constitutionally protected' ". GB 18, quoting 462 U.S. at 885. The Government interprets this statement as directed only to those aggravating factors that make a defendant death-eligible at the first "threshold" stage of the capital sentencing process, not to aggravating factors used at the second "discretionary" stage. GB 18-19.

However, *Zant*'s reference to the impropriety of attaching the "aggravating label" to constitutionally protected conduct was clearly made in the context of the "discretionary" phase of Georgia's two-stage process. There was no operative distinction between statutory and non-statutory aggravating circumstances in the jury's discretionary penalty decision. A non-statutory aggravating circumstance carried no less weight in the jury's discretionary decision. The harm recognized was the attachment of the "aggravating label" to constitutionally protected belief and association. Had constitutionally protected belief been offered as an aggravating circumstance, it would not have been admissible at either phase in Georgia. *Zant v. Stephens,* 462 U.S. at 885. Otherwise, states would be free to punish ordinarily protected belief simply by not classifying it by statute as a punishable aggravating circumstance and thereby permitting prosecutors to punish protected belief at will.

There is simply no rational difference between the two *Gregg* or "Georgia-type" stages for First Amendment purposes. The First Amendment is not concerned with

regularizing the application of criteria for capital sentencing (as is the Eighth Amendment rule of *Furman v. Georgia*, 408 U.S. 238 (1974) and its progeny), but rather with assuring against the penalization of constitutionally protected conduct. It is immaterial whether such penalization occurs in a single-factor or a multi-factor decisional process, one that is rule-bound or one that is discretionary. Compare GB 19. A parade-permit ordinance that allowed time, place, manner, *and* content of the parade sponsor's message to be "weighed" in a system of guided discretion by the permit-issuing authority would be no less offensive to the First Amendment than an ordinance that omitted the first three factors.

The government argues that the distinction between using constitutionally protected conduct as the basis for death-eligibility at the "threshold" stage and using it as the reason for a death sentence at the "discretionary" stage is just common sense: "it strains common sense to assert that a sentencing authority could not consider [an academic] . . . essay [articulating the abstract argument that prison guards deserve to be killed by prison inmates] as some evidence of a defendant's character and future dangerousness". GB 19. But excluding such evidence does not strain common sense at all if common sense accepts the premise that abstract essay-writing unconnected with inciting violent actions is constitutionally protected free expression. What does strain common sense is the Government's use of this example to show a supposed distinction between the first and second stages of a Georgia-style capital sentencing procedure. If common sense really called for the use of the hypothetical essay at the second stage of such a procedure, the same common

sense would equally call for its use at the first stage – a use the Respondent concedes is unconstitutional: "Admittedly, the Constitution might bar a state legislature from using [protected expression] as a death penalty trip wire." RB 24.

The Government is equally wrong in its second set of "examples," found at GB 20. There it makes the point that a crime which could not itself be punished by death under *Coker v. Georgia*, 433 U.S. 584 (1987), can nevertheless be used at the second stage of the sentencing process to "persuade[ ] the jury that the defendant's record is so bad that he should be sentenced to death". GB 20. Of course it can. Such a crime can also be used at the *first* stage of the Georgia-style process, as an aggravating circumstance which make the defendant death-eligible. Most states use at least some noncapital prior felony convictions in both ways. The Government utters a purported although counterfeit distinction between these stages; the real distinction is between the use of felony convictions and the use of constitutionally protected speech, belief or association *at any stage* as an aggravating factor calling for the death sentence.

Although both the defendant and the respondent acknowledge that this Court's teachings recognize it is desirable that the jury have as much information as possible when it makes the sentencing decision, the respondent and the government have ignored a long-standing limitation on the scope of that evidence: "So long as the evidence introduced and the arguments made at the presentence hearing *do not prejudice* a defendant, it is preferable not to impose restrictions." (emphasis added), *Gregg v. Georgia*, 428 U.S. 153, 203-204 (1976). And as the Court

recently reiterated in *Payne*, "the rules of evidence generally extant at the federal and state levels anticipate that relevant, *unprivileged* evidence should be admitted and its weight left to the fact-finder. . . . " (emphasis added), *Payne v. Tennessee*, 111 S.Ct. at 2607 (citing *Barefoot v. Estelle*, 463 U.S. 880, 898 (1983).

B. Beliefs and Associations Protected by the First Amendment are not *Per Se* Relevant to Warrant the Execution of a Defendant Convicted of Murder. Only Very Limited Use of such Evidence, Not Present in the Instant Case but Illustrated in *Barclay v. Florida* and *United States v. Abel*, Would be Permitted on Narrow and Traditional Grounds Under the Eighth Amendment.

Both the Respondent and the Government contend that *Barclay v. Florida*, 463 U.S. 939 (1983), supports their position that "the usually First Amendment precepts . . . have no application to the final discretionary stage of capital sentencing". RB 29-32; GB 17-18. Such a reading of *Barclay* is bizarre. The Respondent apparently arrives at it by equating racially motivated murder (in Barclay's case) with the joining of an organization that holds racist views (in Dawson's case), as though the two events were constitutionally indistinguishable. RB 32-33 n. 13. The Government, for its part, acknowledges that Dawson's situation "differs from *Barclay* in that the evidence did not show that [Dawson's] . . . membership in the Aryan Brotherhood was related to the murder itself", GB 17, but then says that this difference is immaterial because "the defendant's character, as well as the circumstances of the crime, can constitutionally be deemed

relevant to the sentencing determination". GB 17. Each misses the whole point of the difference: that the causal connection between Barclay's racism and murder took his racism outside of the realm of constitutional protection under the elementary First Amendment principle that the Government recites elsewhere in its brief but ignores here – namely, that the First Amendment does not protect ideology " ' "directed to inciting or producing imminent lawless action," ' " GB 15, quoting *Texas v. Johnson*, 491 U.S. 397, 409 (1989), quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). This principle foreclosed any First Amendment claim on Barclay's behalf, and of course his lawyers never made one.

The Government also ignores settled constitutional doctrine in rewriting *United States v. Abel*, 469 U.S. 45 (1984), as a supposedly relevant and favorable precedent. GB 16-17. The holding in *Abel* was squarely based upon a hornbook rule repeatedly applied in this Court's cases dealing with impeachment: that a defendant or a witness in his behalf cannot elect to testify, ask the jury to believe their testimony, and simultaneously deny the jury access to information pertinent to believability. *E.g., Michigan v. Harvey*, 110 S.Ct. 1176 (1990); *United States v. Havens*, 446 U.S. 620 (1980); *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971). The decisive point in *Abel*, as in any of these impeachment cases, was that the evidence in question was not being used – and, indeed, the jury was explicitly forbidden to use it – in whole or in any part as a basis for penalization, punishment or enhanced punishment; it was admitted solely as bearing on the credibility of volunteered testimony.

Both the Respondent and the Government also imply, more or less obliquely, that the prosecution's Aryan Brotherhood evidence was a "counter-point", or "counterbalance", to, or "rebutted", Dawson's mitigating evidence. RB 37-38; GB 22-23. But this is a sheer distortion of the record. Dawson's case in mitigation was presented after the trial court's ruling on his renewed motion *in limine* to preclude the prosecution's use of the Aryan Brotherhood evidence in aggravation. The prosecutor announced his intention to present the Aryan Brotherhood evidence in his opening statement at the penalty phase. J.A. 62. To treat the Aryan Brotherhood evidence now as some sort of "rebuttal" of Dawson's case in mitigation is as fanciful as it is impermissible. See *Harrison v. United States*, 392 U.S. 219 (1968). Significantly, the Delaware Supreme Court invoked no theory of "rebuttal" in upholding the admission of the Aryan Brotherhood evidence; rather, it concluded that this evidence "properly focused the jury's attention on Dawson's character." J.A. 191; see generally J.A. 182-192.

The Respondent and the Government likewise distort the record by suggesting, (both in footnote), that the stipulation between Dawson's counsel and the prosecutor as to how the Aryan Brotherhood evidence would be presented to the jury after the rejection of Dawson's First Amendment claim by the trial court makes it inappropriate for Dawson "to object to the supposed blandness of the evidence", RB 19 n. 6; see GB 26 n. 8 – that is, to the fact that the evidence showed nothing more about the Aryan Brotherhood than that it "refers to a white racist prison gang". J.A. 184. The Respondent also concedes, however, that "the prosecutors wove Dawson's . . . self-

identification as Abaddon, and his embrace of the Aryan Brotherhood into a central theme that Dawson had an incorrigible character. . . . " RB 9. As the Respondent concedes elsewhere in its brief, the stipulation avoided only the necessity of the trial court's ultimately weighing the probative value of the various possible formulations of the Aryan Brotherhood evidence against their prejudicial impact under Delaware Evidence Rule 403, RB 6, 34; the stipulation did not affect the trial court's earlier ruling that "membership or the act of joining an organization of any particular kind, whether it be the Aryan Brotherhood or the Boy Scouts of America [sic] can be probative of character, at least to some extent" and is not prohibited by the First Amendment. J.A. 52.[1] In the light of this ruling, both the prosecutor and defense counsel decided what they wanted the record to show about the nature of the Aryan Brotherhood; and the stipulation was the result. The only hints of criminality or, indeed, of any non-ideological activity on the part of the Aryan Brotherhood that the prosecutor chose to put into evidence were whatever vague connotations cluster around the phrase "prison gang." Compare RB 37-38 with *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). If these do not suffice to take Aryan Brotherhood membership out of the scope of First Amendment protection – and plainly they do not – then the prosecutor asked the jury for a death sentence based

---

[1] The Delaware Supreme Court found that "[t]he Superior Court ultimately concluded that the State could introduce evidence about the Aryan Brotherhood during the penalty phase of Dawson's trial." *Dawson v State*, 581 A.2d 1078, 1088, n. 8 (Del. 1990) J.A. 152.

on Dawson's exercise of First Amendment rights. Dawson's claim was fuliy preserved in the record and decided on the merits by the Delaware Supreme Court.

Furthermore, neither the respondent nor the government elaborate as to why this evidence must be "information necessary to determine the proper punishment for a first-degree murder." *Payne v. Tennessee*, 111 S.Ct. at 2608, other than claiming it is "character" evidence and that there is an "enduring moral consensus" against racism. RB 35. They are satisfied that such a belief may have permissibly been the crucial factor in the jury's decision between life and death. As the government expressly concedes with respect to this case, "[T]he jury's consideration of a defendant's constitutionally protected beliefs or associations could conceivably be the factor that tips the balance in favor of the death penalty." GB 19.

It has previously been observed by this Court, however, that the death penalty is said to serve two principal social purposes; retribution and deterrence of capital crimes by prospective offenders. Another purpose mentioned is the incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future. *Gregg v. Georgia*, 428 U.S. at 183, n. 28. If that is so, the respondent does not adequately explain what is the purpose of punishing by death abstract beliefs in racial separatism or superiority otherwise protected by the First Amendment. Is it governmental retribution against those who hold such beliefs? Is deterring those beliefs by killing those who maintain them a legitimate government goal permitted by the First Amendment? Finally, may the government reduce the incidence of those beliefs by implementing

judicial procedures which are more likely to result in death by execution of those who hold such beliefs?[2]

C. No Principle of "Parity" or "Symmetry" Espoused by Delaware Under the Eighth Amendment Prohibiting Cruel and Unusual Punishment Would Permit the State to Execute a Defendant Although His Beliefs and Associations Would Ordinarily be Protected by the First Amendment.

The Respondent and the Government both argue that Dawson's claim of First Amendment protection is

---

[2] If you are from Delaware, the respondent's reflections about the "enduring moral consensus" against racism, and travel over considerable geographical and temporal distances to the Civil War and to the United Nations Charter, RB 35-36, are somewhat incongruous at best. Delaware's Constitution presently provides that "separate schools for white and colored children shall be maintained." Del. Const. of 1897, art. X, Section 2. No Attorney General has attempted to abolish that provision despite numerous subsequent amendments to the state constitution. Nearly forty years ago, Delaware's Attorney General asked for relief in this Court from an order of its own Supreme Court ordering desegregation on equal protection grounds in several racially segregated "separate but equal" school districts. *Gebhart v. Belton*, 91 A.2d 137 (Del. 1952), modified *sub. nom., Brown v. Board of Education*, 347 U.S. 483 (1954). Only thirty years ago, a Delaware state agency unconstitutionally maintained that it had no responsibility with respect to its lessee's racial discrimination in a public restaurant. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). At about the time of David Dawson's conviction, the same prosecutor who prosecuted him, asked a black defendant the "magnificent[ly] irrelevan[t]" question of whether he had been looking for "some loose white women." *Weddington v. State*, 545 A.2d 607, 610, 612 (Del. 1988).

"lopsided", RB 33, creating an "asymmetrical application" of evidentiary restrictions to the prosecution and defense: "If only the defendant could introduce evidence of his beliefs and associations, the jury would often receive an incomplete and unbalanced account of the defendant's character." GB 21; see generally RB 33; GB 20-24.

No constitutional principle of "symmetry" or "parity" allows a State, however, to argue for death at a penalty hearing without traditional constitutional restrictions simply because a defendant may offer wide-ranging evidence in mitigation of death. In fact the Court has already expressly recognized that "symmetry" simply does not exist in this context:

> In contrast to the carefully defined standards that must narrow a sentencer's discretion *to impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence.

McKoy v. North Carolina, 110 S.Ct. 1227, 1234 (1990) (citations omitted) (emphasis in original).

In addition, the respondent's argument has plainly distorted Dawson's position. Dawson does not contend that prosecutors are prohibited from presenting bad-character evidence while defendants remain free to present good-character evidence. Prosecutors, however, cannot constitutionally equate bad ideology – within the quite narrow range of speech and belief protected by the First Amendment – with "bad character" and thereby automatically present bad-ideology evidence in aggravation.

This Court has never before suggested "character" evidence has the unrestricted bounds which both the respondent and the government presently urge is punishable. As has recently been confirmed in *Payne*, 111 S.Ct. at 2606-08, the role of the sentencing jury may be as conservative as is constitutionally permitted and differs little in this respect from the traditional role of sentencing judge with respect to sentencing for any other offense: "It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner. We have long recognized that '[f]or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). "*Character* of the offender", although both Delaware and the government now contend otherwise, has never meant anything more in the death penalty context that it has in the ordinary sentencing context. That the jury consider the circumstances of the crime and the "character" of the offender had never meant anything other than that:

> These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends sentence . . . [T]he jury's attention is directed to the specific circumstances of the crime . . . In addition, the jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment . . . ' *Gregg, id.* at 197.

Death sentencing in this respect differs little from all other sentencing. Neither judge nor jury may punish, penalize, sanction, disapprove, "refuse to endorse" or whatever else the respondent may prefer to call it, any beliefs or associations protected by the First Amendment. Just as a sentencing judge could not give Jim Bakker more time for making other religious people look bad or dishonest, a sentencing judge could not decide to execute him if he were convicted for murder because a religious man should know better. *United States v. Bakker*, 925 F.2d 728 (4th Cir.1991).

Nonetheless, the Government conjures up legions of bogeymen when it says that "adoption of petitioner's position would ensure that questions of First Amendment protection would arise in virtually every case in which a State sought to offer evidence of the defendant's statements or associations in an effort to prove his character for purposes of a capital sentencing proceeding." GB 24. Despite the notable resourcefulness of capital defense lawyers in appealing constitutional issues whenever they arise, there are few cases in which anything like this First Amendment issue has indeed arisen: most prosecuting authorities and jurisdictions recognize as a matter of traditional course that First Amendment beliefs and associations may not be criminalized, penalized, or used as any basis for a sentence of death.

Furthermore, a defendant is not required to forego a constitutional right in a death penalty proceeding merely because the State may introduce wide-ranging evidence against him or because he may offer wide-ranging evidence in his own behalf. The State may not ask a jury to sentence a defendant to death, although he may be the

only surviving witness to the murder and chose not to testify in his own behalf, because he has not expressed remorse. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). "A judge [or jury] might impose a specially severe penalty solely because of a defendant's race, religion or political views. . . . In all of these instances any additional punishment would of course be . . . flagrantly unconstitutional." *North Carolina v. Pearce*, 395 U.S. 711, 742 (1969) (opinion of Black, J.).

Moreover, within the specific First Amendment context, "asymmetries" are neither inappropriate nor avoidable. By their nature, the Bill of Rights and the First Amendment are inherently a limitation on governmental power, not a restraint on individual liberties. It is expectable and fitting that people derive certain benefits from the exercise of the freedoms that the First Amendment prohibits governments from punishing. Governments frequently promote these very benefits but cannot therefore "symmetrically" penalize them. A State can, for example, support associations of public employees when these associations further the State's interest in collective bargaining but it cannot outlaw them when they oppose the State's interest by advocating higher wages for their members. A City can give its "Teacher of the Year Award" to a public-school teacher who teaches the history of the city inspirationally but it cannot punish one who teaches its history satirically. These and similar "imbalances" (*e.g.*, a State can sponsor exhibits of Afro-American or Native American art but it cannot forbid them), are a

result of the limited but vital function of the First Amendment itself. That Amendment is a restriction of government's power to trammel ideological diversity, not a general command as to how government should conduct its affairs, and still less a limitation on how people may use or benefit from the freedoms that it guarantees them.

Dawson's position therefore implies no "asymmetrical application", RB 33, that "would distort the presentation of evidence to sentencing juries and undermine the rationality of their sentencing determinations" in capital cases. GB 21. Dawson has always conceded that if a capital defendant offers evidence of his laudable beliefs or association in mitigation, the prosecution may offer relevant evidence of his less laudable beliefs and associations in rebuttal. The Government's suggestion that this is an "unmanageable" result, GB 21-22, ignores the obvious: a virtually identical procedure governs "character" evidence at the guilt phase of criminal trials in all American jurisdictions; a similar procedure is familiar in connection with the ubiquitous rule that forbids "bolstering the credibility of an unimpeached witness" but allows the rebuttal of impeachment evidence; and another very similar procedure is contemplated by *Buchanan v. Kentucky*, 483 U.S. 402 (1987), in the administration of the constitutional rule of *Estelle v. Smith*, 451 U.S. 454 (1981). Nothing in Dawson's submission to the lower courts or to this Court would permit a capital defendant to present "a one-sided view of [his] . . . character" to the jury, RB 33, or preclude the prosecutor from rebutting any such attempt. The present case involves no issues of this sort.

CONCLUSION

Based upon the foregoing argument and authorities, the Petitioner's sentences of death should be vacated.

Respectfully submitted,

Lawrence M. Sullivan
Public Defender of the
State of Delaware

Bernard J. O'Donnell
Assistant Public Defender
Counsel of Record

Brian J. Bartley
Assistant Public Defender

Office of Public Defender
820 North French Street
Wilmington, Delaware 19801
(302) 577-3230

Attorneys for Petitioner

Supreme Court, U.S.
FILED
JUL 25 1991
OFFICE OF THE CLERK

No. 90-6704

In the Supreme Court of the United States

OCTOBER TERM, 1991

DAVID DAWSON, PETITIONER

v.

STATE OF DELAWARE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

ROBERT A. LONG, JR.
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Constitution bars a State from introducing, in a capital sentencing proceeding, evidence concerning the defendant's association with a white racist prison gang.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	8
Argument:	
The Constitution does not bar the admission of evidence concerning the defendant's beliefs, attitudes, and associations at the sentencing phase of a capital trial	10
A. The sentencing authority may consider a wide range of factors in making the sentencing decision	10
B. The Constitution does not erect a *per se* barrier excluding from a capital sentencing proceeding relevant evidence concerning a defendant's beliefs and activities	12
1. A defendant's beliefs and associations may be relevant to the capital sentencing decision	13
2. The constitutional restrictions on criminalizing protected conduct do not apply where the evidence is relevant to the guilt or penalty phase of a criminal trial	15
C. A *per se* rule would distort the sentencing process and would be difficult to apply	20
D. The absence of a per se rule barring admission of evidence concerning beliefs and associations does not imply that such evidence is always admissible	24
E. The evidence and argument at issue in this case did not violate petitioner's constitutional rights	26
Conclusion	27

TABLE OF AUTHORITIES

Cases:

Baldwin v. *Alabama*, 472 U.S. 372 (1985)	7
Barclay v. *Florida*, 463 U.S. 939 (1983)	17, 18

Cases—Continued: Page

Barefoot v. *Estelle*, 463 U.S. 880 (1983) 11
Beck v. *Alabama*, 447 U.S. 625 (1980) 25
Booth v. *Maryland*, 482 U.S. 496 (1987) 12
Brandenburg v. *Ohio*, 395 U.S. 444 (1969) 15, 16
California v. *Brown*, 479 U.S. 538 (1987) 7
California v. *Ramos*, 463 U.S. 992 (1983) 11, 13, 19
Coker v. *Georgia*, 433 U.S. 584 (1977) 20
Commonwealth v. *Abu-Jamal*, 521 Pa. 188, 555 A.2d 846 (1989), cert. denied, 111 S. Ct. 215 (1990) 7, 18, 19
Darden v. *Wainwright*, 477 U.S. 168 (1986) 25
Eddings v. *Oklahoma*, 455 U.S. 104 (1982) 13
Franklin v. *Lynaugh*, 487 U.S. 164 (1988) 14, 20-21
Gregg v. *Georgia*, 428 U.S. 153 (1976) 11
Healy v. *James*, 408 U.S. 169 (1972) 15
Jones v. *North Carolina Prisoner's Union*, 433 U.S. 119 (1977) 15
Jurek v. *Texas*, 428 U.S. 262 (1976) 12
Lockett v. *Ohio*, 438 U.S. 586 (1978) 13, 20
McCleskey v. *Kemp*, 481 U.S. 279 (1987) 11, 18
North Carolina v. *Pearce*, 395 U.S. 711 (1969) 11
Payne v. *Tennessee*, No. 90-5721 (June 27, 1991) .. 8, 10, 11, 12, 13, 21, 22, 23, 25, 26
Penry v. *Lynaugh*, 492 U.S. 302 (1989) 13, 20
Rutan v. *Republican Party of Illinois*, 110 S. Ct. 2729 (1990) 21
Scales v. *United States*, 367 U.S. 203 (1961) 15, 16
Skipper v. *South Carolina*, 476 U.S. 1 (1986) 13
South Carolina v. *Gathers*, 490 U.S. 805 (1989) 12, 23
Snyder v. *Massachusetts*, 291 U.S. 97 (1934) 21
Texas v. *Johnson*, 491 U.S. 397 (1989) 15
Thornburg v. *Abbott*, 490 U.S. 401 (1987) 15
Turner v. *Safley*, 482 U.S. 78 (1987) 15
United States v. *Abel*, 469 U.S. 45 (1984) 16, 18
United States v. *Bakker*, 925 F.2d 728 (4th Cir. 1991) 24
United States v. *Bangert*, 645 F.2d 1297 (8th Cir. 1981) 24
United States v. *Grayson*, 438 U.S. 41 (1978) 11, 14
United States v. *Hendrix*, 505 F.2d 1233 (2d Cir. 1974) 14
United States v. *Tucker*, 404 U.S. 443 (1972) 10

Cases—Continued: Page

Wasman v. *United States*, 468 U.S. 559 (1984) 11
Williams v. *New York*, 337 U.S. 241 (1949) 10, 11
Woodson v. *North Carolina*, 428 U.S. 280 (1976) 13
Zant v. *Stephens*, 462 U.S. 862 (1983) 7, 9, 13, 18, 24

Constitution and statutes:

U.S. Const.:
Amend. I 4, 12, 17, 21, 23, 24
Amend. VIII 12
Due Process Clause 25
18 U.S.C. 3553(a)(1) 1
18 U.S.C. 3661 1
21 U.S.C. 848(e) 2
21 U.S.C. 848(j) 2
21 U.S.C. 848(k) 2
Del. Code Ann. tit. 11 (1985):
§ 4209(e)(1)(a) 7
§ 4209(j) 7
§ 4209(o) 7

Miscellaneous:

137 Cong. Rec. S3195-S3196 (daily ed. Mar. 13, 1991) 2
137 Cong. Rec. S9986-S9987 (daily ed. July 15, 1991) 2
S. 635, 102d Cong., 1st Sess. (1991) 2
S. 1241, 102d Cong., 1st Sess. (1991) 2

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-6704

DAVID DAWSON, PETITIONER

v.

STATE OF DELAWARE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The issue in this case is important to the administration of criminal justice in the federal system because it concerns the extent to which evidence of a defendant's character may be introduced at a sentencing proceeding. In imposing sentences under the Sentencing Guidelines, Congress has directed federal courts to consider "the history and characteristics of the defendant," 18 U.S.C. 3553(a)(1), and has provided that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence," 18 U.S.C. 3661.

Even if the issue is confined to capital sentencing proceedings, the federal government has an interest in the resolution of the issue presented here because of its ap-

plication to federal capital cases. For example, federal law authorizes the death penalty for intentional killings connected to a continuing criminal enterprise. 21 U.S.C. 848(e). For certain kinds of homicides, the death penalty may be imposed if the sentencing authority finds one or more statutory aggravating circumstances to be present. 21 U.S.C. 848(k). In addition, information may be presented as to any other aggravating factor for which notice has been provided. 21 U.S.C. 848(j). The statute thus authorizes the government to introduce evidence concerning the defendant's character and likely future behavior to assist the jury in determining whether to recommend the death penalty for a defendant who qualifies for that penalty under the statute. The Court's resolution of the question presented here will affect the administration of that provision of federal law and similar provisions in legislation that may be enacted in the future.[1]

STATEMENT

Following a jury trial, petitioner was convicted on four counts of first degree murder, six counts of possession of a deadly weapon during the commission of a felony, and one count each of first degree burglary, second degree burglary, robbery, theft, and possession of a deadly weapon by a prohibited person. He was sentenced to death on the murder convictions and imprisonment for a total of 100 years on the other convictions. The Delaware Supreme Court affirmed. J.A. 135-209.

1. Shortly after midnight on December 1, 1986, petitioner and three other inmates escaped from the Dela-

[1] Recent legislative efforts demonstrate a continuing interest in the use of non-statutory aggravating evidence in capital sentencing proceedings. See S. 635, 102d Cong., 1st Sess. §§ 3592-3593, 137 Cong. Rec. S3195-S3196 (daily ed. Mar. 13, 1991) (providing for the admission of non-statutory aggravating evidence at a sentencing hearing in federal death penalty cases); S. 1241, 102d Cong., 1st Sess. §§ 3592-3593, 137 Cong. Rec. S9986-S9987 (daily ed. July 15, 1991) (same).

ware Correctional Center near Smyrna, Delaware. Petitioner stole a car and drove south; the other three inmates stole another car and headed north. Early that morning, petitioner burglarized a house near Kenton, Delaware, where he stole a motorcycle jacket, pocket watches, and loose change. J.A. 137-140.

Shortly thereafter, petitioner entered the home of Richard and Madeline Kisner, located about half a mile from the site of the burglary. Mrs. Kisner was alone in the house preparing to leave for work. Petitioner murdered Mrs. Kisner and stole the Kisners' car and some money. J.A. 140-142.

When the Kisners' son returned home from school that afternoon, he found his mother lying on a bed in a red house coat. She had been stabbed 12 times in the chest and had lacerations on her forehead. She had been gagged with a sock, and her hands had been tied behind her back with shoelaces. There were strangulation wounds on her neck. J.A. 141.

That evening, petitioner appeared at the Zoo Bar in Milford, Delaware, wearing a motorcycle jacket that did not fit him. Petitioner introduced himself to a woman in the bar and told her his name was "Abaddon," which he said meant "one of Satan's disciples." Petitioner subsequently was asked to leave the bar. At about 9:25 that evening the police found the Kisners' car parked near the bar. Petitioner's fingerprints were found inside the car. J.A. 142-143, 185.

About an hour later, a Delaware state trooper responded to a call to investigate a one-car accident. The car, which had been reported stolen from a location near the Zoo Bar, had been driven across the road and into a ditch. At about 5:25 the next morning, after a house-to-house search, petitioner was found hiding on the floor of an automobile about three-tenths of a mile from the scene of the accident. He was wearing the stolen motorcycle jacket and carrying four of the stolen pocket watches. He was also carrying a sock that matched the

one used to gag Mrs. Kisner. Red fibers on the motorcycle jacket and petitioner's shirt matched those of the victim's house coat. Bloodstains on petitioner's clothing matched the victim's blood type. J.A. 143-145.

2. Petitioner is a member of the Aryan Brotherhood, a "white supremacist Nazi oriented gang." J.A. 146. The Aryan Brotherhood "originated at the San Quentin Prison in California in response to perceived threats from racial minority gangs of inmates." *Ibid.* The trial court stated that the Aryan Brotherhood has a reputation for violence "against black and Latino prison gangs," and that "[i]ts apparent motto [is] [k]ill to get in and die to get out." *Id.* at 146-147 n.5. Petitioner has the words "Aryan Brotherhood" tattooed on his right hand. Petitioner also has several swastikas tattooed on his body. While awaiting trial, petitioner painted a swastika on the wall of his prison cell. *Id.* at 146-147.

Prior to trial, petitioner filed a motion *in limine* seeking to exclude all evidence relating to the Aryan Brotherhood. The State responded that it did not intend to introduce any such evidence at the guilt phase of the trial, but that it would offer the evidence at the penalty phase if petitioner were convicted. The trial court deferred ruling on the motion. J.A. 5, 147-149.

Following petitioner's conviction, the State gave notice that during the penalty phase of the trial it intended to introduce (1) expert testimony about the Aryan Brotherhood, (2) testimony that petitioner refers to himself as "Abaddon" (angel of hell) and has the name "Abaddon" tattooed in red letters across his stomach, and (3) photographs of petitioner's tattoos and the swastika he painted on the wall of his prison cell. Petitioner argued that this evidence was inflammatory and irrelevant, and that its admission would violate his rights under the First Amendment. J.A. 183-184.

After hearing the parties' arguments, the trial court observed that

> membership or the act of joining an organization of any particular kind, whether it be the Aryan Brotherhood or the Boy Scouts of America can be probative of character, at least to some extent. The real issue before the Court is whether the probative value is outweighed by the danger of unfair prejudice. So let's focus the argument that way.

J.A. 184. Following a recess, the parties agreed to the following stipulation, which was entered into evidence without further objection:

> The Aryan Brotherhood refers to a white racist prison gang that began in the 1960s in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.

Ibid.

In return for petitioner's agreement to the stipulation, the State agreed not to call an expert witness to testify about the Aryan Brotherhood. Petitioner's counsel told the trial court that the stipulation "should resolve that issue." J.A. 54. In addition to the stipulation, the State presented evidence of petitioner's lengthy criminal record, which included numerous juvenile offenses, 14 felony convictions, 24 conduct violations as an inmate, and 6 escapes. The woman who encountered petitioner in the Zoo Bar testified that he identified himself as "Abaddon," and said that the name means "one of Satan's disciples." Finally, a detective testified that the definition of "Abaddon" is "angel of the bottomless pit," and that petitioner has the word "Abaddon" tattooed across his stomach and the words "Aryan Brotherhood" tattooed on his right hand. The State submitted into evidence, without objection, photographs of petitioner's tattoos. J.A. 80-87, 145-146, 184-187.

Petitioner presented the testimony of two members of his family at the penalty hearing. They testified that petitioner had good relations with his family, that they

still loved him and would visit him in prison, and that petitioner had once offered to donate one of his kidneys to a relative. J.A. 88-95, 146. In addition, petitioner elicited testimony from one of the State's witnesses that since 1981 petitioner has participated in Alcoholics Anonymous and in the Green Tree Program, a program for the treatment of drug and alcohol abuse. *Id.* at 79.

During closing argument, the prosecutor commented that petitioner "[c]ould have joined the [Jaycees] in prison. Could have gotten his GED. Could have done something good. What does he become? An Aryan Brother. What does that say about his character and propensities?" J.A. 105. In response, petitioner's counsel argued that the jury should give petitioner's membership in the Aryan Brotherhood and his use of the name Adabbon "absolutely no weight." *Id.* at 115. Petitioner's counsel argued that the jury "might find it personally distasteful that he is what the State says he is, but if he thinks it, if he believes it, but if he doesn't do anything about it, where is the harm?" *Id.* at 117. In rebuttal, the prosecutor argued to the jury that petitioner's membership in the Aryan Brotherhood and his use of the name Abaddon "reflects upon [petitioner's] character. It tells us something about him." *Id.* at 126.

The jury recommended that petitioner be sentenced to death, and the trial court imposed sentence in accordance with that recommendation. J.A. 133, 135-136.

3. The Delaware Supreme Court unanimously affirmed the convictions and the death sentence. J.A. 135-209. The court rejected petitioner's contention that the evidence concerning the Aryan Brotherhood and petitioner's use of the name "Abaddon" should not have been admitted at the penalty hearing. The court observed that the jury, having found three statutory aggravating factors that made petitioner eligible for the death penalty,[2] was "required to make an *individualized* determination of whether [petitioner] should be executed or incarcerated for life, based upon [petitioner's] character, his record and the circumstances of the crime." J.A. 189. In making that determination, the court explained, "it is desirable for the jury to have as much information before it as possible." *Id.* at 190. The court noted this Court's statement that "a death sentence based upon consideration of 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion or political affiliation of the defendant' would violate the Constitution." *Ibid.* (quoting *Baldwin* v. *Alabama*, 472 U.S. 372, 382 (1985), quoting, in turn, *Zant* v. *Stephens*, 462 U.S. 862, 885 (1983)). But the court observed that "[p]unishing a person for expressing his views or for associating with certain people is substantially different from allowing * * * evidence of [the defendant's] character [to be considered] where that character is a relevant inquiry." J.A. 190 (quoting *Commonwealth* v. *Abu-Jamal*, 521 Pa. 188, 215, 555 A.2d 846, 859 (1989), cert. denied, 111 S. Ct. 215 (1990)). Moreover, the court noted, the sentence should reflect "a reasoned moral response to the defendant's background [and] character." J.A. 190 (quoting *California* v. *Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

The court concluded that because the evidence relating to the Aryan Brotherhood and the name Abaddon was relevant to a proper purpose of the sentencing proceeding, its admission did not violate petitioner's constitutional rights. The brief presentation of evidence concerning the Aryan Brotherhood "properly focused the jury's attention on [petitioner's] character," and was not offered as an appeal to the jurors' passions or prejudices concerning race, religion, or political affiliation. J.A. 191. Petitioner's membership in the Aryan Brotherhood was

---

[2] The jury found the following statutory aggravating circumstances: (1) the murder was committed by an escaped prisoner; (2) the murder was committed during the commission of a burglary or robbery; and (3) the murder was committed for pecuniary gain. J.A. 189 n.27. See Del. Code Ann. tit. 11, § 4209(e)(1)(a), (j), (o).

relevant to his character because it was "indicative of how he wanted to be identified by others" and "was characteristic of his lawless nature and rejection of rehabilitation during his incarceration." *Id.* at 188. Similarly, petitioner's use of the name "Abaddon" "was relevant to his character because it is a reflection of how [petitioner] viewed himself and how he wanted to be viewed, even within hours after Madeline Kisner's murder." *Ibid.* Consequently, the evidence "was necessary to explain [petitioner's] view of himself." *Id.* at 191.

SUMMARY OF ARGUMENT

In *Payne* v. *Tennessee*, No. 90-5721 (June 27, 1991), the Court held that the Constitution does not impose a *per se* rule precluding capital sentencing juries from considering any evidence concerning the victim or the impact of the crime on the victim's family. This case presents a similar question: whether the Constitution imposes a *per se* prohibition against consideration of any of the defendant's beliefs or activities that could not themselves be made the subject of criminal sanctions. In our view, the Constitution creates no such rule.

This Court has held that the Constitution imposes only minimal restrictions on the sentencing authority's freedom to consider a broad range of information in arriving at a just sentence. The freedom to consider a wide spectrum of relevant information at sentencing extends to capital as well as non-capital cases. Indeed, the Court has held that in capital cases it is especially desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

A defendant's attitudes, beliefs, and associations often are highly relevant to the capital sentencing determination. The capital sentencing authority must make an individualized sentencing decision based on the character of the individual and the circumstances of the crime. Membership in an organization—particularly an organization such as a prison gang—can shed light on the defendant's

character and may be relevant to an assessment of the defendant's likely future behavior, whether in prison or in society at large.

Petitioner's argument that a State may not introduce evidence of the defendant's beliefs and associations at sentencing improperly extends the constitutional limitations on criminalizing conduct or beliefs to the very different setting of making evidentiary use of such conduct or beliefs. For example, this Court has held that, although the government may not prosecute a person for advocating the views of the Aryan Brotherhood, it may use the fact of membership in that organization to impeach a witness at trial. Likewise, a capital sentencing authority may consider the fact that the defendant was a member of an organization formed to start a "racial war," even though he could not be prosecuted for joining that organization or advocating its views.

This case is not controlled by the Court's statement that a statutory aggravating factor is constitutionally invalid if it "authorizes a jury to draw adverse inferences from conduct that is constitutionally protected." *Zant* v. *Stephens*, 462 U.S. 862, 885 (1983). The State has not made membership in a prison gang a statutory aggravating factor, *i.e.*, one of the factors that in effect defines the offense of capital murder. Instead, the State has authorized the admission of such evidence, along with a wide range of other non-statutory aggravating and mitigating evidence, only after the jury has determined that the defendant falls within the category of persons eligible for the death penalty. At that stage of the proceeding, the jury is free to consider a host of factors bearing on the defendant's character and likely future behavior to determine whether death is the appropriate sentence.

Petitioner greatly exaggerates the implications of a decision affirming the judgment of the Delaware Supreme Court. State trial and appellate courts can, and do, control the admission of irrelevant or unduly prejudicial evidence in sentencing proceedings as a matter of state law.

And if the evidence in a particular case is so inflammatory and so clearly irrelevant that it renders the proceeding fundamentally unfair, the defendant can assert a constitutional claim under the Due Process Clause.

The admission of evidence concerning petitioner's membership in the Aryan Brotherhood did not violate the Constitution. As the state courts found, that evidence was relevant to petitioner's character and likely future behavior. The presentation of the evidence was brief and not calculated to appeal to the jury's passions or prejudices. Because it provided the jury with a useful source of insight into petitioner's character, it was properly admitted for the jury's consideration at sentencing.

ARGUMENT

THE CONSTITUTION DOES NOT BAR THE ADMISSION OF EVIDENCE CONCERNING THE DEFENDANT'S BELIEFS, ATTITUDES, AND ASSOCIATIONS AT THE SENTENCING PHASE OF A CAPITAL TRIAL

A. The Sentencing Authority May Consider A Wide Range Of Factors In Making The Sentencing Decision

Sentencing authorities have traditionally been accorded virtually unlimited freedom to consider a wide range of information in arriving at an appropriate sentence. See *Payne* v. *Tennessee*, No. 90-5721 (June 27, 1991), slip op. 10; *United States* v. *Tucker*, 404 U.S. 443, 446 (1972) ("[A] judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.").

In *Williams* v. *New York*, 337 U.S. 241 (1949), the Court upheld the constitutionality of a state policy that encouraged the sentencing authority "to consider information about the convicted person's past life, health, habits, conduct, and mental and moral propensities." *Id.* at 245. Justice Black's opinion for the Court in *Williams* distinguished between "[t]ribunals passing on the guilt of a defendant," which "always have been hedged in by strict evidentiary procedural limitations," and sentencing authorities, which have not been so restricted. *Id.* at 246. The Court observed that "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Ibid.* The Court explained that this policy is consistent with the view "that the punishment should fit the offender and not merely the crime." *Id.* at 247. See also *Wasman* v. *United States*, 468 U.S. 559, 563-564 (1984); *United States* v. *Grayson*, 438 U.S. 41, 50 (1978); *North Carolina* v. *Pearce*, 395 U.S. 711, 723 (1969).

The sentencing authority's freedom to consider a wide range of information extends to capital as well as noncapital cases. *Payne* v. *Tennessee*, *supra*; *Williams* v. *New York*, *supra*. It is true that "the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold" for imposing the death penalty. *McCleskey* v. *Kemp*, 481 U.S. 279, 305 (1987). But once the jury finds that a defendant meets that threshold, it "is free to consider a myriad of factors to determine whether death is the appropriate punishment." *California* v. *Ramos*, 463 U.S. 992, 1008 (1983). In *Barefoot* v. *Estelle*, 463 U.S. 880 (1983), for example, the Court held that the Constitution does not bar capital sentencing juries from considering expert testimony predicting the defendant's future dangerousness. The Court observed that "the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder." *Id.* at 898. And in *Gregg* v. *Georgia*, 428 U.S. 153 (1976), the lead opinion concluded that,

"[s]o long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision." *Id.* at 203-204 (opinion of Stewart, Powell, and Stevens, JJ). See also *Jurek* v. *Texas*, 428 U.S. 262, 276 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.").[3]

B. The Constitution Does Not Erect A *Per Se* Barrier Excluding From A Capital Sentencing Proceeding Relevant Evidence Concerning A Defendant's Beliefs And Activities

Petitioner contends (Br. 17-26) that the Constitution forbids the admission, in a sentencing proceeding, of any evidence concerning beliefs or activities that are protected under the First Amendment. That contention, however, ignores the important distinction between criminalizing conduct that is protected by the First Amendment and considering such conduct, where it is relevant, as a factor in the sentencing determination. Petitioner's proposed rule would "deprive[] the State of the full moral force of its evidence and * * * prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder." *Payne*, slip op. 15.[4]

---

[3] In *Booth* v. *Maryland*, 482 U.S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U.S. 805 (1989), the Court held that the Eighth Amendment bars the admission of victim impact evidence during the sentencing phase of a capital trial. *Booth* and *Gathers* represented a departure from the general principle that the Constitution imposes only minimal restrictions on the sentencing authority's freedom to consider a wide range of evidence. In *Payne* v. *Tennessee*, *supra*, the Court reexamined and overruled *Booth* and *Gathers*.

[4] In his petition for certiorari, petitioner advanced a broad contention that "general character evidence is to be offered in mitigation not for aggravation of the offense." Pet. 17. In support of that contention, petitioner relied on this Court's conclusion that "a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death." *Payne*, slip op. 12. See *Eddings* v. *Oklahoma*, 455 U.S. 104, 110 (1982); *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Petitioner appears to have abandoned that broad argument in his brief on the merits. In any event, that argument is refuted by the Court's decision in *Payne* v. *Tennessee*, *supra*. In *Payne*, the Court explained that the statements in *Woodson* and *Eddings* were "not intended to describe a class of evidence that *could not* be received, but a class of evidence which *must* be received." Slip op. 12.

1. *A Defendant's Beliefs And Associations May Be Relevant To The Capital Sentencing Decision*

There is no doubt that a defendant's attitudes, beliefs, and associations may be highly relevant to the capital sentencing decision. Of course, "the States, and not this Court, retain 'the traditional authority' to determine what particular evidence [in sentencing proceedings] is relevant in the first instance." *Skipper* v. *South Carolina*, 476 U.S. 1, 11 (Powell, J., concurring in judgment) (quoting *Lockett* v. *Ohio*, 438 U.S. 586, 604 n.12 (1978) (plurality opinion)). In capital cases, moreover, the Court has held that the sentencing authority is required to consider each defendant as a "uniquely individual human being[]," *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, and Stevens, JJ.), and to arrive at "an *individualized* determination on the basis of the character of the individual" as well as "the circumstances of the crime." *Zant* v. *Stephens*, 462 U.S. 862, 879 (1983); *Eddings* v. *Oklahoma*, 455 U.S. 104, 110-112 (1982); *Lockett* v. *Ohio*, 438 U.S. at 601-605 (plurality opinion). The capital sentencing jury's determination "should reflect a reasoned *moral* response to the defendant's background, character, and crime." *Penry* v. *Lynaugh*, 492 U.S. 302, 304 (1989) (quoting *California* v. *Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

As the trial court recognized (J.A. 184), membership in any organization "can be probative of character, at least to some extent." Membership in an organization such as the Aryan Brotherhood is highly probative of character: it suggests the defendant's "lawless nature and rejection of rehabilitation during his incarceration." J.A. 188. Moreover, membership in an organization—particularly a prison gang—is highly relevant to the jury's consideration of the defendant's attitude toward society and his likely future behavior in prison. See *Franklin* v. *Lynaugh*, 487 U.S. 164, 178 (1988) (plurality opinion) (defendant's likely future behavior in prison is relevant to the capital sentencing determination); *United States* v. *Grayson*, 438 U.S. at 51 ("Impressions about the individual being sentenced—[including] * * * the degree to which he does or does not deem himself at war with his society—are, for better or worse, central factors to be appraised under our theory of 'individualized' sentencing.") (quoting *United States* v. *Hendrix*, 505 F.2d 1233, 1236 (2d Cir. 1974)).

Petitioner does not contend that the evidence at issue in this case lacks probative value as to his character and likely future behavior, or that these factors are irrelevant to the capital sentencing determination. On the contrary, he concedes that "[o]ur beliefs may shed light on our character in all sorts of ways whether we believe in Allah or the Pope, the NAACP or the KKK, an organized religion or atheism, the Black Hebrews or the Aryan Brotherhood." Pet. Br. 23. Petitioner nevertheless argues for a constitutional rule barring the admission of any evidence concerning beliefs or activities if those beliefs or activities could not themselves be made subject to criminal or civil penalties.

2. *The Constitutional Restrictions On Criminalizing Protected Conduct Do Not Apply Where The Evidence Is Relevant To The Guilt or Penalty Phase Of A Criminal Trial*

The Constitution prevents the government from imposing criminal penalties for the expression of provocative ideas unless "the expression 'is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" *Texas* v. *Johnson*, 491 U.S. 397, 409 (1989) (quoting *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969)). Moreover, the government ordinarily may not impose criminal liability for association with an organization absent proof of "a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." *Healy* v. *James*, 408 U.S. 169, 186 (1972). See *Scales* v. *United States*, 367 U.S. 203 (1961). Although the restrictions on the First Amendment rights of prisoners might well justify a prohibition against membership in a group such as the Aryan Brotherhood,[5] we assume for purposes of this case that a prisoner's identification with the group, or at least his act of embracing its views, without more, could not constitutionally be made the subject of prosecution. Thus, we do not quarrel with petitioner's contention that the State could not make it a crime to hold or express racist views, or to express one's affiliation with an organization that espouses such views.[6]

---

[5] This Court has recognized that "[t]he fact of confinement and the needs of the penal institution impose limitations on the constitutional rights, including those derived from the First Amendment, which are implicit in incarceration." *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119, 125 (1977). See generally *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989); *Turner* v. *Safley*, 482 U.S. 78 (1987).

[6] Petitioner asserts (Pet. Br. 15) that "[t]he prosecutor did not undertake to show that the Aryan Brotherhood, or whatever group went by that name in any Delaware prison, had committed any unlawful acts." That is not so. The State made a proffer of evidence that the Aryan Brotherhood has illegal aims, including "the control

While a person may not be prosecuted for his beliefs or associations, however, nothing in the Constitution prohibits the State from making evidentiary use of beliefs or associations when they are relevant to a criminal prosecution.

The distinction between criminalizing constitutionally protected conduct and making evidentiary use of such conduct is illustrated by *United States* v. *Abel*, 469 U.S. 45 (1984). In *Abel*, the Court held that the Constitution did not prevent the government from impeaching a defense witness by showing that both the defendant and the witness were members of the Aryan Brotherhood, and that members were sworn to lie for each other. The Court expressly rejected the defendant's argument that cases such as *Scales* and *Brandenburg* require a different result. The Court explained (469 U.S. at 52-53) that

> [t]hose cases dealt with the constitutional requirements for convicting persons under the Smith Act and state syndicalism laws * * *. [M]embership in the Aryan Brotherhood was not offered to convict either [the defendant or the defense witness] of a crime, but to impeach [the witness's] testimony. * * * For purposes of the law of evidence the jury may be permitted to draw an inference of subscription to the tenets of the organization from membership alone, even though such an inference would not be sufficient to convict beyond a reasonable doubt in a criminal prosecution.

Abel holds that the prosecution may introduce evidence, over a First Amendment challenge, of the defendant's beliefs and his affiliation with the Aryan Brotherhood, where it is relevant to a witness's credibility. The

---

of drugs within the prison institutions" and "violent escape attempts," and that "full-fledged" membership in the Aryan Brotherhood (known as "earning your bones") "requires either a murder or an attempted murder of another inmate." J.A. 33, 37. Moreover, the inmates who broke out of prison with petitioner were fellow members of the Aryan Brotherhood. See *id.* at 39 (inmates Nave, Irwin, and McCoy members of Brotherhood).

same principle applies to the admission of similar evidence, over a similar First Amendment challenge, when the evidence is relevant to matters the State has put in issue in a sentencing proceeding, such as the defendant's character and likely future behavior.

In *Barclay* v. *Florida*, 463 U.S. 939 (1983), the defendants were members of a group called the Black Liberation Army. The sentencing judge found that the purpose of the group was "to start a revolution and a racial war." *Id.* at 942. The defendant and other members of the organization killed a hitchhiker in an effort to start the "racial war." The Court did not suggest that defendant's membership in the Black Liberation Army or his racial views were unprotected by the First Amendment. Nevertheless, the Court held that it was proper for the sentencer to consider the defendant's racial animus toward the victim as a factor bearing on the sentencing decision. The plurality explained that "[i]t is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing." *Id.* at 950. See also *id.* at 970 & n.18 (Stevens, J., concurring in judgment) ("judge's candid exposition of his deeply felt concern about racial crimes * * * does not undermine the legitimacy of the ultimate sentence, * * * because it pertained * * * to the trial judge's exercise of his sentencing discretion.").

This case differs from *Barclay* in that the evidence did not show that petitioner's membership in the Aryan Brotherhood was related to the murder itself. But this Court has recognized that the defendant's character, as well as the circumstances of the crime, can constitutionally be deemed relevant to the sentencing determination, and petitioner's membership in the Aryan Brotherhood unquestionably was relevant to his character and likely future behavior. Accordingly, there is no basis for a constitutional distinction between cases such as *Barclay*, where the evidence is relevant to the circumstances of the

crime, and this case, where the evidence is relevant to other material issues at sentencing.

Barclay and *Abel* refute petitioner's assertion that the Constitution bars the evidentiary use of beliefs and activities that could not themselves be made the subjects of criminal sanctions. As the Pennsylvania Supreme Court noted in response to a similar claim, "[p]unishing a person for expressing his views or for associating with certain people is substantially different from allowing his statements to be used for impeachment or to be considered as evidence of his character where that character is a relevant inquiry." *Commonwealth* v. *Abu-Jamal*, 521 Pa. at 215, 555 A.2d at 859.

Petitioner repeatedly relies (Pet. Br. 13, 14, 16, 17, 26) on this Court's suggestion in *Zant* v. *Stephens*, 462 U.S. at 885, that a statutory aggravating factor is constitutionally invalid if it "authorizes a jury to draw adverse inferences from conduct that is constitutionally protected." As examples of constitutionally protected conduct, the Court in *Zant* listed "the display of a red flag, cf. *Stromberg* v. *California*, [283 U.S. 359 (1931)], [or] the expression of unpopular political views, cf. *Terminiello* v. *Chicago*, 337 U.S. 1 (1949)." Contrary to petitioner's assertions, those statements in *Zant* do not control this case.

As noted above, this Court has identified two distinct phases of the capital sentencing process. The initial phase establishes "a required threshold below which the death penalty cannot be imposed." *McCleskey* v. *Kemp*, 481 U.S. 279, 305 (1987). At that stage, the State must establish "rational criteria that narrow the decision-maker's judgment as to whether the circumstances of a particular defendant's case meet the threshold." *Ibid.* Thus, the selection of statutory aggravating factors in effect defines the offense of capital murder. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, however, "the jury * * * is free to consider a myriad of

factors to determine whether death is the appropriate punishment." *California* v. *Ramos*, 463 U.S. 992, 1008 (1983).

Delaware has not made membership in a racist gang a statutory aggravating factor that qualifies a defendant for the death penalty. Thus, Delaware has not made "constitutionally protected conduct an aggravating circumstance, thereby 'elevating' a crime to the status of a capital offense on the basis of impermissible factors." *Commonwealth* v. *Abu-Jamal*, 521 Pa. at 215, 555 A.2d at 859. It is only at the final stage of the capital sentencing proceeding, where the jury must weigh a "myriad" of non-statutory mitigating and aggravating evidence, that evidence such as petitioner's gang membership may be considered in aggravation. That approach to the reasoned, moral judgment required of a capital sentencing authority does not offend the Constitution.

To be sure, the jury's consideration of a defendant's constitutionally protected beliefs or associations could conceivably be the factor that tips the balance in favor of the death penalty. But the same could be true of any number of other factors that could not in themselves subject the defendant to prosecution or qualify him for the death penalty. Suppose, for example, that a defendant wrote an essay expressing his belief that all prison guards deserve to be murdered by the inmates. The State could not make it a crime to hold or express such an opinion, absent a clear and present danger of inciting prison violence. But it strains common sense to assert that a sentencing authority could not consider the essay as some evidence of the defendant's character and future dangerousness. To take another example, a person may not be prosecuted for expressing contempt for others, but where the defendant expresses contempt for his victim and the victim's family members, rather than remorse, the defendant's attitude may surely be taken into account at sentencing. Likewise, a person may not be prosecuted for expressing admiration for, and a desire to emulate,

a particularly violent killer, but such expressions are surely within the competence of a sentencing hearing at which the defendant's character is in issue.

The same analysis is applicable to consideration of the defendant's prior record. For example, a prior conviction of rape might be the factor that persuades the jury that the defendant's record is so bad that he should be sentenced to death. That would be permissible, even though the Court has held that imposition of the death penalty as the punishment for the crime of rape would be unconstitutional. See *Coker* v. *Georgia*, 433 U.S. 584 (1977). The same analysis would apply even if it turned out that a single shoplifting conviction tipped the balance in a close case in favor of the death penalty for a defendant convicted of murder. That is so because, even though it could be said that the death penalty was imposed "as a result of" the shoplifting conviction, it was not imposed "for" the offense of shoplifting, but for the murder. Likewise, although it is conceivable that the defendant in *Abel* was convicted because the government successfully impeached the defendant's witness by showing that he and the defendant were both members of the Aryan Brotherhood, the defendant was not convicted "for" belonging to the Aryan Brotherhood. Under the same reasoning, it is clear that the death penalty in this case was not imposed "for" petitioner's membership in the Aryan Brotherhood, but for murder.

C. A *Per Se* Rule Would Distort The Sentencing Process And Would Be Difficult To Apply

This Court has held that a sentencer in a capital case may not be prevented from considering, as a mitigating factor, any aspect of a defendant's character or record that the defendant proffers as a basis for a sentence less than death. *Penry* v. *Lynaugh*, 492 U.S. 302, 317 (1989); *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978). For example, the defendant may present evidence that he is devoutly religious, see *Franklin* v. *Lynaugh*, 487 U.S.

164, 186 (1988) (O'Connor, J., concurring in the judgment) ("Evidence of * * * religious devotion might demonstrate positive character traits that might mitigate against the death penalty."); *id.* at 190 (Stevens, J., dissenting) ("Evidence of * * * regular church attendance" is relevant to character). In light of the defendant's unrestricted right to present mitigating evidence, a rule of the sort that petitioner urges, which would forbid the prosecution from presenting any evidence concerning the defendant's protected activities or beliefs, would distort the presentation of evidence to sentencing juries and undermine the rationality of their sentencing determinations.

If only the defendant could introduce evidence of his beliefs and associations, the jury would often receive an incomplete and unbalanced account of the defendant's character. In *Payne*, the Court rejected a similar rule excluding victim impact evidence, observing that "justice, though due to the accused, is due to the accuser also." Slip op. 17 (quoting *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934)). Indeed, if petitioner's First Amendment rule were adopted, it would cast doubt on the constitutionality of the principle that defendants are free to proffer any relevant mitigating evidence and in effect may be given "credit" by the sentencing authority for joining organizations and embracing beliefs that the sentencing authority considers to be worthy. If the First Amendment forbids "penalizing" defendants for antisocial beliefs by permitting the State to introduce evidence of those beliefs at sentencing, it must also forbid selectively "rewarding" defendants who hold views that are widely admired, thereby effectively penalizing those defendants who do not. See *Rutan* v. *Republican Party of Illinois*, 110 S. Ct. 2729 (1990) (promotions based on political affiliation impermissibly infringe public employees' First Amendment rights).

Even if the First Amendment rule proposed by petitioner could be limited to evidence offered by the prosecution, problems of application would still make that rule

unmanageable. It is undisputed that the prosecution is entitled to rebut the defendant's mitigating evidence, even if it concerns beliefs or activities that could not be made subject to criminal sanctions. See *Payne* v. *Tennessee*, slip op. 4-5 (Stevens, J., dissenting) ("Just as the defendant is entitled to introduce any relevant mitigating evidence, so the State may rebut that evidence."). Petitioner appears to concede as much. See Pet. 20-21 ("If the defendant has offered 'character' evidence to the effect that he was a life-long member of the NAACP * * * and believed in their goals, evidence of an actual association with an organization with established antithetical goals, conceivably may have been proper rebuttal."). Yet, there is no persuasive reason to draw a constitutional line between evidence introduced in rebuttal and evidence introduced by the prosecution in the first instance.

The sentencing authority's freedom to consider a wide spectrum of relevant evidence has never turned on whether the defendant agrees to allow the sentencer to consider such evidence. Moreover, the distinction between rebuttal and non-rebuttal evidence is far from clear. As petitioner's own example demonstrates, the prosecution could rebut evidence that petitioner was a life-long member of the NAACP by showing either that petitioner did not in fact belong to the NAACP, or that he belonged to an organization with inconsistent goals, such as the Aryan Brotherhood. In this case, petitioner adduced evidence that he had attended meetings of Alcoholics Anonymous in prison. That evidence was relevant not only to the narrow issue whether petitioner was making a sincere effort to overcome his alcohol and drug problems, but also to the broader issue of petitioner's likely future behavior as a prisoner and to his overall attitude toward his role in society. The State's evidence that petitioner belonged to the Aryan Brotherhood rebutted petitioner's broader suggestion that he was making constructive use of his time in prison and viewed it as important to

address problems that may have been associated with his life in crime.[7]

Petitioner's proposed rule, like the rule rejected in *Payne*, would also create an unworkable standard of constitutional relevance. The range of speech and expressive conduct subject to protection under the First Amendment is quite broad. Questions inevitably would arise as to whether various types of evidence or prosecutorial argument risk imposing the death sentence "because of" the deefndant's exercise of his First Amendment rights. Cf. *South Carolina* v. *Gathers*, 490 U.S. at 813 (O'Connor, J., dissenting). In addition, confusion would arise where factual details that would be inadmissible under petitioner's *per se* rule were disclosed during the guilt phase of the trial. See *Payne* v. *Tennessee*, slip op. 6 (Souter, J., concurring).

Some of the acts at issue in this case provide a good illustration of the sort of confusion that petitioner's proposed rule would engender. A question would arise, for example, whether petitioner's act of painting a swastika on his cell wall could be introduced only to show a willingness to deface prison property, and not to suggest adherence to neo-Nazi beliefs, or even to suggest a more

---

[7] The unworkable nature of petitioner's proposed distinction between rebuttal use and other uses of evidence of a defendant's associaitons and beliefs can be illustrated by the following example: Suppose state law created a rebuttable presumption that capital defendants are of good character and likely to be model prisoners. Consistent with petitioner's "rebuttal" theory, the State would apparently be free to rebut that presumption, just as it is free to rebut mitigating evidence introduced by the defendant. And if a State can admit evidence of the sort at issue in this case to rebut a presumption of good character, it should be equally free to admit such evidence to ensure that the jury will not assume, based on the absence of evidence to the contrary, that the defendant's adjustment to prison has been satisfactory. Even if a distinction such as petitioner proposes could be made workable as a matter of state evidentiary law, there is nothing in the Constitution that suggests that the distinction must be maintained as a matter of constitutional compulsion.

general attitude of defiance toward prison authorities. Another question could arise whether, for example, the State could offer evidence that petitioner chose to associate with a particularly violent and disruptive group of inmates in the prison, but could not introduce evidence that petitioner and those inmates shared the belief that violence in prison was appropriate. In sum, adoption of petitioner's position would ensure that questions of First Amendment protection would arise in virtually every case in which a State sought to offer evidence of the defendant's statements or associations in an effort to prove his character for purposes of a capital sentencing proceeding.

D. The Absence of a *Per Se* Rule Barring Admission of Evidence Concerning Beliefs and Associations Does Not Imply That Such Evidence Is Always Admissible

Petitioner asserts (Pet. Br. 23-24) that if the judgment in this case is affirmed, prosecutors will be free to argue that defendants should receive the death penalty because they support unpopular political figures or causes, hold unpopular religious views, or engage in unpopular forms of political expression such as flag-burning. Those concerns are exaggerated and can be dealt with by means other than a *per se* constitutional rule barring all evidence of beliefs and associations.

First, factors such as the defendant's race, nationality, political affiliation, and religious beliefs and activities are ordinarily deemed irrelevant to the sentencing determination and are excluded from consideration on that ground. See *Zant* v. *Stephens*, 462 U.S. at 885; *United States* v. *Bakker*, 925 F.2d 728, 740 (4th Cir. 1991); *United States* v. *Bangert*, 645 F.2d 1297, 1308 (8th Cir. 1981). Other factors, including evidence of the defendant's statements or his membership in particular organizations, may be subject to exclusion on the ground that their prejudicial impact outweighs their probative value. In this case, for example, the trial court weighed the prejudicial impact of the State's evidence against its probative value, and ruled

that it would exclude some of the State's evidence. See J.A. 25, 58, 186. When the trial court does not exclude the evidence, it may give the jury a limiting instruction, guiding the jury in its use of the evidence. And, of course, defense counsel is free to argue that the jury should give little or no weight to the prosecution's evidence.

Second, the absence of a *per se* constitutional rule barring admission of any aggravating evidence concerning the defendant's associations and beliefs does not imply that the admission of such evidence could never violate the Constitution. While some beliefs and associations can fairly be said to reflect criminal propensity, a court must exclude evidence of beliefs and associations that do not reflect bad character, but are merely unpopular in the community. The admission of such evidence that prejudices the defendant and is clearly irrelevant to a proper sentencing determination may render the sentencing proceeding fundamentally unfair, in which case the defendant may pursue a claim under the Due Process Clause. See *Payne*, slip op. 15; *Darden* v. *Wainwright*, 477 U.S. 168, 179-183 (1986); *Beck* v. *Alabama*, 447 U.S. 625, 637-638 (1980).

The fact that it is sometimes difficult to draw a distinction between beliefs and associations that reflect bad character and those that are merely unpopular does not justify the creation of a constitutional rule barring the admission of all such evidence. Nor is the risk of jury misuse of such evidence sufficiently grave as to require that the jury be deprived of the evidence even when it may be of great value in making the sentencing decision. In capital cases, juries must make a moral judgment based in significant part on the character of the defendant. Inevitably, there is some risk that a jury confronted with this complex and demanding task will consider irrelevant factors, or will allow passion or prejudice to supplant a reasoned moral judgment. But just as that risk does not bar the prosecution from offering "a glimpse of the life"

which the defendant "chose to extinguish," *Payne*, slip op. 12, so too it does not bar the prosecution from offering the jury a glimpse of the character of the defendant, whose life the jury has in its hands.

E. The Evidence And Argument At Issue In This Case Did Not Violate Petitioner's Constitutional Rights

The Constitution does not require exclusion of the evidence at issue in this case. Besides being relevant to his character and likely future behavior, the State's evidence was presented in a brief and noninflammatory fashion.

Petitioner does not contend that he used the name "Abaddon" in connection with any religious belief or practice. Petitioner's references to himself as "Abaddon" were in effect statements that he regarded himself, and wished others to regard him, as an evil man. The Constitution does not shield a defendant against the State's use of such self-revelatory statements at the sentencing phase of a criminal trial.

The admission of the Aryan Brotherhood evidence was also constitutional. Even assuming that petitioner properly preserved his objections to the admission of that evidence,[8] the evidence was highly relevant to petitioner's character and likely future behavior in prison. As the Delaware Supreme Court explained, petitioner's "affiliation with this type of organization was not only indicative of how he identified himself and how he wanted to be identified by others, but * * * was characteristic of his lawless nature and rejection of rehabilitation during his incarceration." J.A. 188. The State's brief, noninflammatory presentation of that probative evidence regarding petitioner's character did not violate the Constitution.

[8] Petitioner agreed to the admission of a brief stipulation concerning the Aryan Brotherhood in order to prevent the jury from hearing an expert witness's detailed testimony concerning that organization. Petitioner is now seeking to repudiate that agreement. In the Delaware Supreme Court, petitioner argued that he "was 'forced' to enter the stipulation in order to guarantee that a relatively 'sterile' description of the Aryan Brotherhood would be presented to the jury." J.A. 185. But petitioner, like all defendants, had the option of preserving his objections for appeal. Instead, he entered into a compromise agreement with the prosecution in hopes of improving his chances at trial. It is true that the Delaware Supreme Court considered and rejected petitioner's constitutional argument on the merits. But the Delaware court did not hold that petitioner had preserved his constitutional objection, and we think it doubtful that he did.

CONCLUSION

The judgment of the Supreme Court of Delaware should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

ROBERT A. LONG, JR.
Assistant to the Solicitor General

JULY 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 292061 20647

Supreme Court, U.S.
FILED
MAY 31 1991
OFFICE OF THE CLERK

No. 90-6704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DAVID DAWSON,

vs.

Petitioner,

DELAWARE,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF DELAWARE

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, ACLU OF DELAWARE, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Of Counsel:

STUART ALTSCHULER
MARJORIE S. JACOBSON
Sonnenschein Nath & Rosenthal
8000 Sears Tower
Chicago, Illinois 60606

JOHN A. POWELL
STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
132 W. 43rd Street
New York, New York 10036

JONATHAN LANG
888 Seventh Avenue
New York, New York 10106

MICHAEL A. BAMBERGER
Sonnenschein Nath & Rosenthal
900 Third Avenue
New York, New York 10022
(212) 891-2000
Counsel of Record for Amici Curiae

May 31, 1991

Merrill Corporation • Chicago • 312-930-2700

21 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

BRIEF IN SUPPORT OF PETITIONER 1

STATEMENT 2

INTEREST OF *AMICI* 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

THE FIRST AND FOURTEENTH AMENDMENTS BAR THE STATE FROM USING A DEFENDANT'S BELIEFS AND ASSOCIATIONS—UNRELATED TO ANY CONDUCT—AS A BASIS FOR IMPOSING THE DEATH PENALTY

CONCLUSION 16

TABLE OF AUTHORITIES

Page

American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) 7

Aptheker v. Secretary of State, 378 U.S. 500 (1964) 7

Baldwin v. Alabama, 472 U.S. 372 (1985) 5

Bates v. City of Little Rock, 361 U.S. 516 (1960) 7

Brandenburg v. Ohio, 395 U.S. 444 (1969) 4, 7, 8

Caldwell v. Mississippi, 472 U.S. 320 (1985) 13

Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978) 7

DeJonge v. Oregon, 299 U.S. 353 (1937) 7

Employment Division, Department of Human Resources v. Smith, 110 S. Ct. 1595 (1990) 7, 13

Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963) 7

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 13

Godfrey v. Georgia, 446 U.S. 420 (1980) 13

Hustler Magazine v. Falwell, 485 U.S. 46 (1988) 14

Lankford v. Idaho, 59 U.S.L.W. 4434 (U.S. May 20, 1991) 12, 14

TABLE OF AUTHORITIES – Continued

Page

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 7

Noto v. United States, 367 U.S. 290 (1961) 8

Police Department v. Mosley, 408 U.S. 92 (1972) 7

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 7

Scales v. United States, 367 U.S. 203 (1961) 8

Terminiello v. City of Chicago, 337 U.S. 1 (1949) 13

Thomas v. Collins, 323 U.S. 516 (1945) 7

United States v. Bakker, 925 F.2d 728 (4th Cir. 1991) 12

United States v. Bangert, 645 F.2d 1297 (8th Cir.), *cert. denied*, 454 U.S. 860 (1981) 5

United States v. Lee, 455 U.S. 252 (1982) 13

United States v. Lemon, 723 F.2d 922 (D.C. Cir. 1983) ... 5, 8, 15

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 12

Zant v. Stephens, 462 U.S. 862 (1983) 4

No. 90-6704

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

DAVID DAWSON,

Petitioner,

vs.

DELAWARE,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Delaware

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, ACLU OF DELAWARE, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STATEMENT

The American Civil Liberties Union, the ACLU of Delaware, and the National Association of Criminal Defense Lawyers submit this brief, *amici curiae*, urging reversal of the decision below. This brief is submitted upon the written consents of counsel for both petitioner and respondent, which are submitted herewith. (The originals of respondent's consent were sent directly to the Court.)

INTEREST OF *AMICI*

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan, nonprofit organization with nearly 300,000 members dedicated to preserving the principles of individual liberty embodied in the Constitution. The ACLU of Delaware is one of its statewide affiliates. Since its founding more than 70 years ago, the ACLU has consistently taken the position that the right to hold unpopular views is protected by the First Amendment and that such unpopular views cannot, by themselves, be outlawed or punished. This case once again involves that core principle of constitutional law and thus raises issues of central concern to the ACLU.

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation with a membership comprised of more than 5,000 lawyers and 25,000 affiliate members, including representatives of every state. NACDL was founded 25 years ago to promote study and research in the field of criminal defense law, to disseminate and advance knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence, and expertise of defense lawyers. Among NACDL's stated objectives is promoting the proper administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual rights and the improvement of criminal law, its practices and procedures. Those concerns are directly implicated by this case.

SUMMARY OF ARGUMENT

In seeking the death sentence during the penalty phase of David Dawson's murder trial, the State of Delaware presented and emphasized to the jury evidence which purportedly proved that Dawson was an adherent of the Aryan Brotherhood, a "white racist prison gang," and that he had satanic religious beliefs. Dawson's associations and beliefs are protected by the First Amendment. The State conceded that these beliefs and associations had no relationship to the murder, to Dawson's prior criminal convictions, or to any other "bad act" attributable to Dawson. The State's only justification for presenting such evidence as an "aggravating" factor warranting the death penalty was that it supposedly established Dawson's bad "character." The State expressly argued that certain beliefs were "good" while Dawson's beliefs were "bad."

The First and Fourteenth Amendments prohibit the basing of punishment on one's beliefs or associations unrelated to any actual or threatened conduct. Weakening that basic constitutional principle would severely chill the free exercise of First Amendment rights, since no one can be sure that his or her beliefs or associations will not be viewed by a jury as offensive or generally indicative of "bad character." The State's labeling of beliefs as "good" or "bad" thus violated the First Amendment. It was also an unrestrained appeal to the jury's passions and prejudices, in direct contravention of the constitutional limitations imposed by this Court on the capital-sentencing process.

ARGUMENT

THE FIRST AND FOURTEENTH AMENDMENTS BAR THE STATE FROM USING A DEFENDANT'S BELIEFS AND ASSOCIATIONS—UNRELATED TO ANY CONDUCT—AS A BASIS FOR IMPOSING THE DEATH PENALTY

The State sought and obtained a death sentence based upon evidence of David Dawson's constitutionally protected beliefs and associations as an "aggravating" circumstance, even though the State conceded that those beliefs and associations were unrelated to Dawson's crime or any other prior bad acts or conduct (and indeed without proof that any *other* member of the group he supposedly joined had committed or advocated any crimes or bad acts). In its zeal to obtain a death sentence at any cost, the State expressly argued to the jury that some beliefs were better than others, and that Dawson's beliefs justified increasing his punishment from life imprisonment to death. The State's action in seeking "to punish mere advocacy and . . . assembly with others," *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969), was a clear violation of the First and Fourteenth Amendments.

This Court has already made it clear that mere advocacy and other activity protected by the First Amendment may not be treated as an "aggravating" circumstance in capital cases. As the Court observed in *Zant v. Stephens*, 462 U.S. 862 (1983), an "aggravating" circumstance will be invalid if it "authorizes a jury to draw adverse inferences from conduct that is constitutionally protected"—*e.g.*, "the display of a red flag" or "the expression of unpopular political views." *Id.* at 885. Thus, a sentencing procedure will be struck down if it has "attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process,

such as for example the race, religion, or political affiliation of the defendant . . . ." *Id.* Dawson's beliefs and associations fall within these categories of protected First Amendment activities.[1]

The State argued that Dawson deserved the death penalty because of his bad character, as evidenced not by any acts or propensities or psychological characteristics, but merely by certain opinions he held about race and religion. Dawson supposedly viewed himself as a member of a white racist group, the Aryan Brotherhood. However, there was no evidence that racism motivated Dawson's crime or any other conduct.[2] There was also no evidence that the Aryan Brotherhood itself engages in illegal acts or has illegal objectives, much less that Dawson sought to further any of its acts or objectives. In addition, Dawson supposedly held satanic religious beliefs, as manifested by his occasional use of the nickname "Abbadon," a demonic reference he also exhibited as a tattoo. Again, there was no evidence that Dawson's religious beliefs motivated his crime or any other conduct. This was the extent of the State's proof as to these nonstatutory "aggravating" factors.

Moreover, the State's "proof" of Dawson's beliefs and associations was highly speculative. While the State referred to Dawson's

---

[1] *See also Baldwin v. Alabama*, 472 U.S. 372, 382 (1985); *United States v. Lemon*, 723 F.2d 922, 938 (D.C. Cir. 1983) ("A sentence based to any degree on activity or beliefs protected by the first amendment is constitutionally invalid"); *United States v. Bangert*, 645 F.2d 1297, 1308 (8th Cir.) ("Consideration of political beliefs, as distinguished from criminal activity, would clearly be impermissible in determining defendants' sentences, because it would impair the rights of the defendants under the First Amendment, protecting public expression of their political beliefs, by words and symbols"), *cert. denied*, 454 U.S. 860 (1981).

[2] Dawson's victim, Mrs. Kisner, was white, as is Dawson.

tattoos, belt buckle, and some of his reading materials (see Joint App. pp. 35-36), it presented no concrete evidence of Dawson's beliefs or of his actual membership in the Aryan Brotherhood, conceding to the trial judge that Dawson's membership could not be positively established: "[T]he State doesn't see it as particularly necessary to show that the defendant has undergone some right [*sic*] of initiation into this group." (Joint App. p. 37.) Despite this, the State flatly told the jury in its opening statement at the penalty hearing: "You will hear evidence that the defendant *is a member* of the Aryan Brotherhood." (Joint App. p. 62) (emphasis added).

Nor was there any evidence that the Aryan Brotherhood had acted illegally in the Delaware prison system. The State offered an expert on *federal* prisons who would have testified that the Aryan Brotherhood is separate from state to state; he admittedly knew nothing about the group in Delaware.[3]

Under the First Amendment, no government agency may prohibit or punish the advocacy of beliefs, however pernicious. The

---

[3] As the prosecutor conceded: "He is not familiar with the Delaware off-shoot of the Aryan Brotherhood . . . . He doesn't know about the Delaware chapter, so he can't tell us what the Delaware chapter does . . . . What he can tell us, just like he was going to describe Christianity. He can tell us what all Christians believe in . . . ." (Joint App. pp. 34, 46.) This testimony was subsequently withdrawn in favor of a stipulation regarding the Aryan Brotherhood, which was read to the jury and stated in its entirety:

> "The Aryan Brotherhood refers to a white racist prison gang that began in the 1960s in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware." (Joint App. p. 84.)

The jury was told nothing more about the Aryan Brotherhood's beliefs or activities.

Ku Klux Klan may propagate its ideas of racial supremacy. *Brandenburg v. Ohio, supra.* Nazis may proclaim their anti-Semitic beliefs in marches through Jewish neighborhoods. *Collin v. Smith,* 578 F.2d 1197 (7th Cir.), *cert. denied,* 439 U.S. 916 (1978). Communists may speak and run for office. *DeJonge v. Oregon,* 299 U.S. 353 (1937). Pornographers may degrade women in graphic, non-obscene, sexually explicit publications. *American Booksellers Ass'n, Inc. v. Hudnut,* 771 F.2d 323 (7th Cir. 1985), *aff'd,* 475 U.S. 1001 (1986). However offensive or subversive, such speech is protected under our constitutional system. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department v. Mosley,* 408 U.S. 92, 95 (1972). *See also Employment Division, Department of Human Resources v. Smith,* 110 S. Ct. 1595, 1599 (1990) (the government may not "punish the expression of religious doctrines it believes to be false . . . , impose special disabilities on the basis of religious views or religious status . . . , or lend its power to one or the other side in controversies over religious authority or dogma") (citations omitted).

The First Amendment also protects the individual's right to join groups and associate with others holding similar beliefs. *See, e.g., Aptheker v. Secretary of State,* 378 U.S. 500, 507 (1964); *Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539, 543 (1963); *Bates v. City of Little Rock,* 361 U.S. 516, 522-23 (1960); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460-61 (1958). "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." *DeJonge, supra,* 299 U.S. at 364. *See Thomas v. Collins,* 323 U.S. 516, 530 (1945). "An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. United States Jaycees,* 468 U.S. 609, 622 (1984). The First Amendment "demands extraordinary safeguards whenever the state

would use against an individual his association with others on the basis of shared beliefs. This is particularly true when those beliefs place the group outside the mainstream of our society and beyond the sympathies and perhaps even the comprehension of the average citizen." *United States v. Lemon*, 723 F.2d 922, 943 (D.C. Cir. 1983) (holding that such associations may not be used as a basis for sentencing).

This Court has repeatedly upheld the right of association even if the group advocates illegal activity, unless there is proof beyond a reasonable doubt that the defendant specifically sought to carry out the group's illegal objective. *See, e.g., Scales v. United States*, 367 U.S. 203, 229 (1961); *Noto v. United States*, 367 U.S. 290, 299-300 (1961). The First Amendment draws a firm distinction between "mere advocacy" on the one hand and "incitement to imminent lawless action" on the other; only the latter may be proscribed. *Brandenburg, supra*, 395 U.S. at 449 n.4.[4]

Thus, even if a group has been shown to engage in illegal activities, courts "must guard against any attempt to spread the taint of illegality throughout the association, for that is the beginning of persecution." *United States v. Lemon, supra*, 723 F.2d at 943. Mere membership in the group may not be made a crime *or* made a basis for harsher punishment, without establishing that the defendant himself actually sought to further illegal conduct. *Id.* at 939-40.

In the present case, there was no proof that any past or "imminent" lawless action was motivated by Dawson's beliefs or

---

[4] Of course, no question is presented here concerning the right of government officials to control the assembly of groups within prisons. There was no proof that Dawson's alleged membership in the Aryan Brotherhood was related in any way to his record of prison disciplinary violations.

affiliations. In fact, at an *in limine* hearing at the start of his trial, the State repeatedly admitted that it could not relate Dawson's beliefs and associations to any acts, criminal or otherwise, by Dawson himself or by anyone else associated with the Delaware Aryan Brotherhood:

> "The State can't produce an expert who can tell us that David Dawson holds this particular belief *or David Dawson acts upon this particular belief.* What we seek to introduce is some understanding of what David Dawson ascribes to himself, the label Aryan Brotherhood, and we will produce ample testimony on that point. That is as to on his hands, the clothing that he wears, correspondence that he keeps and so forth." (Joint App. pp. 34-35) (emphasis added).

* * *

> "We don't see it as particularly important whether the defendant has, in fact, killed in order to gain access to the Aryan Brotherhood or has, in fact, committed a violent escape in order to get in, or has killed another inmate to get in or so forth. But the fact that he ascribes to that general set of ideals . . . ." (Joint App. p. 35.)

* * *

> "In other words, we are looking at the character of this man, David Dawson, and not only things that he does. We know some of the things he does. They will be explained by his prison record and this killing itself, but some of the things he believes in now or ascribes to. Whether he actually has killed in prison isn't important. *What is important is for the jury to understand this is what he is into. This is his character. His character is he thinks the Aryan Brotherhood is a really neat organiza-*

tion and he believes in the things that they believe in. He wears their tattoo. He wears their belt. He carries their literature, he paints his wall and so forth." (Joint App. pp. 37-38) (emphasis added).

* * *

"*We don't think it is important that whether he acted or not acted [sic] on his membership in this group*—what we think is important is that that is the kind of thing that he ascribes to. That is his character. He thinks that the Aryan Brotherhood is an organization that he wishes to align himself with." (Joint App. pp. 48-49) (emphasis added).

* * *

Dawson's racist and satanic beliefs, and his alleged association with the Aryan Brotherhood, were never introduced in the guilt phase of his trial. This was appropriate because they were completely irrelevant to the crime with which he was charged. They were introduced at the penalty phase, under the guise of "character" evidence, solely for the purpose of increasing his punishment.

The prosecutor's arguments in favor of admitting this evidence highlight the violation of basic First Amendment principles. The State expressly argued that Dawson's racial and religious beliefs were relevant "to whether or not the death penalty ought to be imposed." (Joint App. p. 11.) The State described the Aryan Brotherhood as having "other than laudable goals," in contrast to Christianity, which it described as a "good religion." (Joint App. p. 42.) The State's categorization of religions as "good" or "bad" is repugnant to the First Amendment.

These assertions were amplified in the prosecutor's arguments to the jury. After describing the Aryan Brotherhood as "a white racist prison gang," the prosecutor continued:

> "Could have joined the JC's [*sic*] in prison. Could have gotten his GED. Could have done something good. What does he become? An Aryan brother. What does that say about his character and propensities?" (Joint App. p. 105.)

***

"Where is going to AA compare with proclaiming yourself an Aryan brother? Where does abstinence of alcohol, where does temperance range in his list of priorities compared to associating himself with a racist gang?" (Joint App. p. 106.)

* * *

> "Where does the love of [a] half sister who sees him two or three times a month weigh against the real David Dawson who 7 days a week, 35 [*sic*] weeks a year is Aryan brother David Dawson, is Abbadon?" (Joint App. p. 107.)

Beliefs and associations unrelated to any bad acts lie at the protected core of the First Amendment. The State may not ask a jury to consider the exercise of First Amendment rights as a basis for

imposing the death penalty. Indeed, any such attempt can only be seen as an effort to inflame the jury and thereby undermine the constitutional integrity and fairness of the capital-sentencing process.[5] It is not for the State to develop a hierarchy of associations, in which the Jaycees rank high and the Aryan Brotherhood ranks low; in which Alcoholics Anonymous ranks high, but the Aryan Brotherhood ranks so low as to counteract it; in which adherence to Christianity, a "good religion," is praiseworthy, but those who believe in satanism should be put to death.[6]

There is no room in our constitutional system for a prosecutor to denounce beliefs and associations protected by the First Amendment as a factor justifying the death penalty. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Nor may any jury consider such matters in fixing punishment. The First Amendment leaves to each individual the evaluation of beliefs. "However pernicious an opinion may seem, we depend for its correction not on the conscience of

---

[5] *Cf. Lankford v. Idaho*, 59 U.S.L.W. 4434, 4438 (U.S. May 20, 1991) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion") (citations omitted).

[6] Even in the non-capital context, the sentencing authority, whether judge or jury, may not inject its own religious or political views into the sentencing decision. *See United States v. Bakker*, 925 F.2d 728, 740-41 (4th Cir. 1991) (sentencing procedures are invalid if they "create the perception" that sentencers are sitting on "a pulpit from which [they] announce their personal sense of religiosity and simultaneously punish defendants for offending it").

judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). This Court therefore has been vigilant against the "standardization of ideas either by legislatures, courts, or dominant political or community groups." *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949). The State simply may not engage in "the unacceptable 'business of evaluating the relative merits of differing religious claims.'" *Employment Division v. Smith, supra*, 110 S. Ct. at 1604, *quoting United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring).

Furthermore, this Court has repeatedly held that in seeking the death penalty, the State may not appeal to the jury's passions or prejudices through an unguided exercise of discretion. The State "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance.'" *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion) (footnotes omitted).[7] That principle, established under the Eighth and Fourteenth Amendments, can never be obeyed when the State seeks to use beliefs as an "aggravating" factor, because any attempt to give the jury the necessary "guidelines" for determining "good" or "bad" beliefs (whether such "guidelines" are provided by the prosecutor, the judge, or the legislature) will necessarily violate the co-equal First Amendment principle that the government must remain ever neutral in the

---

[7] *See also Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985) (the jury's discretion must be guided because of the "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case'").

marketplace of ideas. *See, e.g., Hustler Magazine v. Falwell,* 485 U.S. 46, 56 (1988). Dawson's case presents a vivid illustration of the State's failure to adhere to either constitutional principle, and its violation of both.[8]

Finally, excluding from consideration this narrow category of evidence—a defendant's beliefs and associations unrelated to any conduct—will not impair the legitimate efforts of prosecutors to obtain the maximum penalty when appropriate. Under the First Amendment, the State remains free to present a wide range of other character evidence to justify increased punishment, including the defendant's psychological state, prior criminal record, and other conduct-related evidence.[9]

On the other hand, if this limited category of evidence concerning associations and beliefs is *not* excluded, the chilling effects on the free exercise of First Amendment rights will be devastating. Each of us will have to fear that our beliefs or associations—even if they are

---

[8] Similarly, besides having to give the jury clear guidelines as to the proper grounds for imposing the death penalty, the government must give each defendant clear advance notice that his or her conduct may be scrutinized as the basis for a death sentence. *Cf. Lankford v. Idaho, supra,* 59 U.S.L.W at 4438. Again, the State cannot include beliefs and associations in any such notification (*e.g.*, by listing them in advance as statutory "aggravating" factors) without violating the neutrality required by the First Amendment.

[9] We do not comment on whether the introduction of such evidence is proper under other constitutional provisions or under state law, as those issues are not before the Court.

considered popular or "mainstream" here and now—could be viewed in some other place or time as a basis for increased punishment, even death. Indeed, as a matter of First Amendment law, there is no distinction between using beliefs as a basis to increase punishment and using them to define an underlying offense. *See, e.g., United States v. Lemon, supra,* 723 F.2d at 937-38. Both involve the criminalization of beliefs, and both are constitutionally prohibited.

CONCLUSION

A court may not punish an individual by imposing a heavier sentence based on his exercise of First Amendment rights. Beliefs that do not meet the approval of a prosecutor or a jury are not punishable by death. Since the jury was not only permitted, but in fact encouraged, to consider the exercise of First Amendment rights as a basis for imposing the death penalty, the judgment below should be reversed, and the matter remanded for a new sentencing hearing in compliance with constitutional requirements.

Respectfully submitted,

Of Counsel:

Stuart Altschuler
Marjorie S. Jacobson
Sonnenschein Nath
& Rosenthal
8000 Sears Tower
Chicago, Illinois 60606

John A. Powell
Steven R. Shapiro
American Civil Liberties
Union Foundation
132 W. 43rd Street
New York, New York 10036

Jonathan Lang
888 Seventh Avenue
New York, New York 10106

Michael A. Bamberger
Sonnenschein Nath & Rosenthal
900 Third Avenue
New York, New York 10022
(212) 891-2000

Counsel of Record for Amici Curiae

May 31, 1991